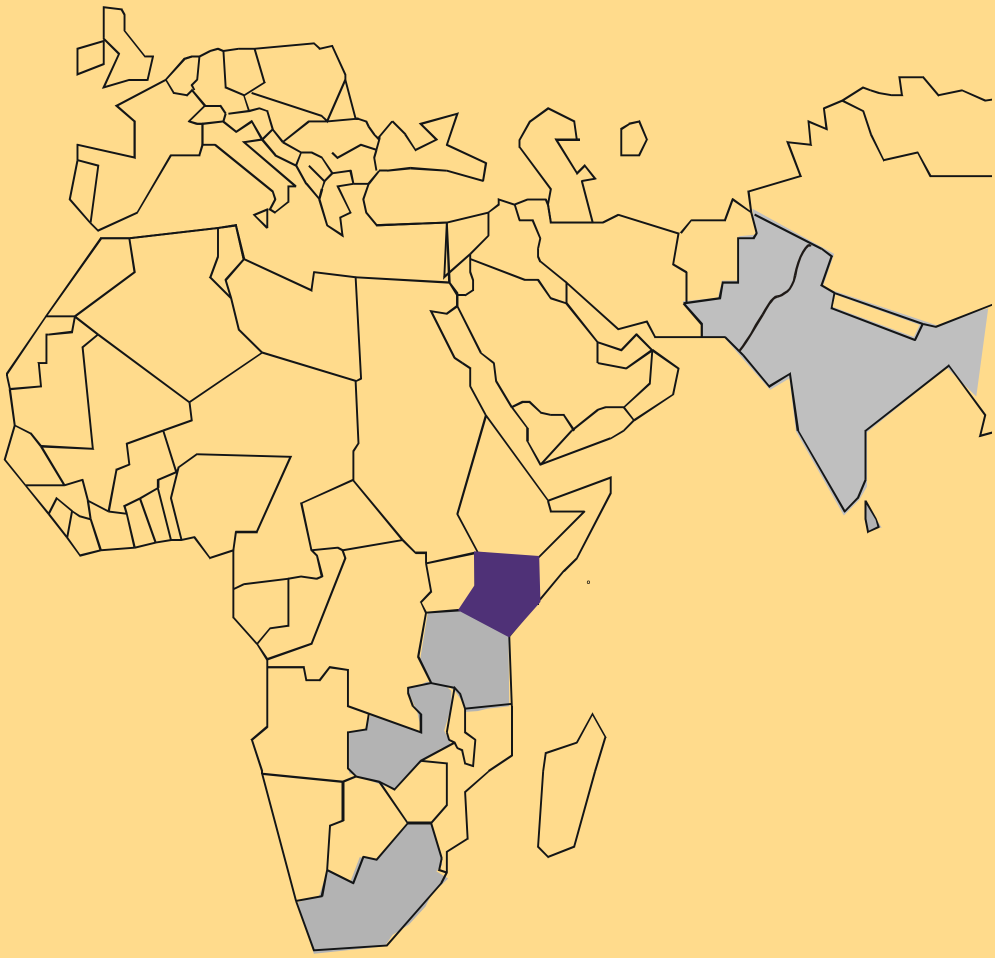
PROMOTING COMPETITIVENESS & EFFICIENCY IN KENYA

THE ROLE OF COMPETITION POLICY & LAW



Institute of
Economic Affairs

#0208

कट्स CUTS

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LIST OF ABBREVIATIONS

CBK	Central Bank of Kenya
CIN	Consumer Information Network, Kenya
COMESA	Common Market for Eastern and Southern Africa
CR4	4-Firm Concentration Ratio
CUTS	Consumer Unity & Trust Society
FDI	Foreign Direct Investment
FTC	Federal Trade Commission, US
FYs	Financial Years
GDP	Gross Domestic Product
GFCF	Gross Fixed Capital Formation
IMF	International Monetary Fund
IPA	Industrial Property Act, Kenya
IPC	Investment Promotion Centre, Kenya
IPRSP	Interim Poverty Reduction Strategy Paper
IT	Information Technology
KCMA	Kenya Coffee Marketing Authority
KCO	Kenya Consumers Organisation
KEBS	Kenya Bureau of Standards
KSH	Kenyan Shillings
KTA	Kenya Transport Association
M&As	Mergers & Acquisitions
MIS	Management Information System
MITI	Ministry of International Trade and Industry, Japan
MPC	Monopolies and Prices Commission, Kenya
MTBs	Ministerial Tender Boards, Kenya
NCPB	National Cereals and Produce Board, Kenya
NGOs	Non Governmental Organisations
OECD	Organisation for Economic Co-operation and Development
PRSP	Poverty Reduction Strategy Paper
PWC	PricewaterhouseCoopers
QRs	Quantitative Restrictions
RTPMPC Act	Restrictive Trade Practices, Monopolies and Price Control Act, Kenya
RTPs	Restrictive Trade Practices
RTPT	(Kenya's) Restrictive Trade Practices Tribunal, Kenya
SAC 1	Structural Adjustment Credit 1, Kenya
SAPs	Structural Adjustment Programmes
SECAL	IMF Sectoral Adjustment Loan
SMEs	Small and Micro Enterprises
SOEs	State Owned Enterprises
SRAs	Sectoral Regulatory Agencies
TNCs	Transnational Corporations
TRIMs	Trade Related Investment Measures
TRIPs	Trade Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
WMS	Welfare Monitoring Survey, Kenya
WTO	World Trade Organisation

FOREWORD

Since the beginning of the 1990s, competition policy has been increasingly recognised as a key component in the ongoing reforms of most developing countries. For Kenya, an important dimension of current changes in competition policy involves the introduction of competition to areas from which it was previously absent, in particular telecommunications and related public infrastructure services. Reform of this kind has been a key component of the privatisation process, and is promoting competition by withdrawing government regulation. There is a need to carry this process forward by examining core services that are usually thought to constitute natural monopolies. This has to be done judiciously since it may be argued that regulatory attempts to correct natural monopolies may reduce welfare by dampening the self-correcting nature of markets and by weakening the property rights that underpin the profit motive.

Another important dimension of competition policy in Kenya concerns mergers and takeovers. The Monopolies and Prices Commission (MPC) has responsibility for lowering monopolistic tendencies in the economy. The current practice emphasises the requirement of a 'market dominance' test before the MPC can approve a merger. In contrast, the basis for considering the consummation of mergers and acquisitions by more modern competition authorities worldwide is increasingly whether the 'market power' of the new entity is likely to result in a 'substantial lessening of competition'. Sophisticated aspects of such analyses stress the dynamic nature of markets, which ensures that monopoly power is constantly vulnerable to the innovations of entrepreneurs motivated by the search for temporary super-profits. These developments in analytical techniques bring new challenges to the competition authorities of developing countries.

This report is a part of the output of the 7-Up project, which is a two-year study of the competition regimes in seven countries of the Commonwealth. As in the other six participating countries, there is a need to change our competition laws in the light of the changing business environment. This is possibly the first attempt to analyse the state of the competition regime in Kenya, and will provide a valuable insight into the current situation as compared to that of other countries at a similar stage in the development process. It will also provide useful guidance for future policy developments.

James Karuga
Chairman
Institute of Economic Affairs, Kenya

PREFACE

Over the last year, the Institute of Economic Affairs, Kenya (IEA) has been the Kenyan partner organisation in a Comparative Study of Competition Regimes in Selected Developing Countries of the Commonwealth, which is supported by the Department for International Development, UK. The project, popularly known as the 7-Up Project, is being implemented by the Consumer Unity & Trust Society (CUTS) Jaipur, India. The purpose of the project is to produce a comparative study of competition regimes in seven developing countries of the Commonwealth. The countries that have been chosen for the study are India, Pakistan, Sri Lanka, Kenya, South Africa, Tanzania and Zambia. The main objective of the Project is to conduct an evaluation of the countries' existing competition legislations and their implementation with regards to features such as budgets, composition, and structure of the competition authority.

In Kenya, during Phase I of the project, the research methodology and implementation of the project were discussed, and a comprehensive questionnaire including questions on issues related to the institutional framework of the Monopolies and Prices Commission (MPC) was distributed. This publication presents the findings from Phase I of the study and examines the current competition laws and policy in Kenya. A Kenya National Reference Group (NRG) comprising of various stakeholders for the advocacy part of the Kenya component of the project was also formed. Meetings were held in Nairobi to discuss the Phase I Country Report.

During Phase II of the project, several competition case studies involving mergers and acquisitions will be studied, with the objective of examining cross-border competition issues.

The Institute is pleased to be a partner organisation in the project. We are grateful to the members of the Kenya NRG for their participation and useful contributions to the project. It is my hope that their intellectual support will continue into Phase II of the project.

The IEA wishes to reiterate its interest in the subject matter generally, and especially in regulatory issues and the traditionally regulated sectors such as utilities and finance. We have begun to carry forward the lessons from our participation in this project in our Law and Economy programme, with a commitment to ensuring that regulatory agencies and the competition authority are effective in their work, raising their profile in pubic policy, and the enhancement of economic welfare in general.

Finally I would like to acknowledge the dedication of the Kenya country researcher, Mr. David Ong'olo, who has prepared this report, and the diligent project management work done by my colleague Mr. Kwame Owino, the 7-Up Kenya Project Manager.

Betty Maina
Chief Executive
Institute of Economic Affairs, Kenya

CHAPTER-I

Introduction

1.1 The Context of Competition Policy and Competition Law in Kenya

Competition law in Kenya originated with the Price Control Ordinance of 1956, renamed the Price Control Act of 1956, and revised in 1972. The philosophical consideration of the country's competition policy has been to protect consumers against price increases. Indeed price control has been "...central to the Kenya Law" (CUTS, 1996:2). In the late 1980s the Restrictive Trade Practices, Monopolies and Price Control Act of 1988 (RTP Act) was enacted, but it is now reportedly undergoing revision. As it stands, the objective of Kenya's competition law is to "…encourage competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and prices and for connected purposes..." (Republic of Kenya 1990:5).

The objective of Kenya's competition law is to "...encourage competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and prices and for connected purposes..."

Kenya's current competition law aims to protect the process of competition. It emphasises reducing entry barriers and restrictive business practices irrespective of which groups they affect. The Act covers three main areas:
- Restrictive trade practices (RTPs);
- Control of monopolies; and
- Control and display of prices (which has been revoked).

1.2 Contents and Main Issues Raised in the Paper

This paper provides a briefing on some pertinent issues in relation to Kenya's competition policy and law. The main arguments may be summarised as follows:

1) Kenya's economy is at an all time low in terms of economic growth and development. Its public policies have been very liberal but the benefits of development have not been seen. In the context of competition policy, it is important for Kenya to look again at its competition policy and law and to re-design it to appropriately take account of its long-term objective of sustained economic growth.

2) Kenya's competition law aims to protect the process of competition *per se*. Hence, it emphasises reducing entry barriers and restrictive business practices irrespective of which groups they affect. The administration of the law appears to overlook restrictive trade practices (RTPs) that fall under section 8 of the Act (refusal or discrimination in supply), which tend to go unnoticed and unreported to the Commission. Tied purchases at the retail level are rampant e.g. in the current sugar shortage situation shopkeepers and supermarkets insist that other items must be bought together with sugar.

3) In order to raise people's standards of living, a central objective of Kenya's competition policy and law must necessarily be the promotion of long-term growth of productivity. The pursuit of the objective is

dynamic rather than static efficiency and it requires, among other things, high rates of investment. This necessitates encouragement of entrepreneurs' propensity to invest.

The rest of this paper is arranged as follows: Chapter two describes the socio-economic development context of the country in terms of various development parameters. This is followed in chapter three by a discussion of the public policy context in Kenya and how trade and industrial policy impinges on competition. Chapter four discusses the scope of the competition law and the various anti-competitive practices that are covered by the Monopolies and Prices Commission (MPC). Chapter five briefly assesses the developmental needs of Kenya in light of the recent Poverty Reduction Strategy Paper (PRSP), and how the policy basis of the current competition law falls short of Kenya's long-term development ideals. Before the conclusions and summary of recommendations in chapter eight, chapter six describes the administrative aspects of the law and how the MPC operates, while chapter seven assesses the current capabilities of the MPC and its needs.

CHAPTER-II

Socio-Economic Developmental Context

2.1 The Economy of Kenya

2.1.1 Sectoral Contributions to GDP

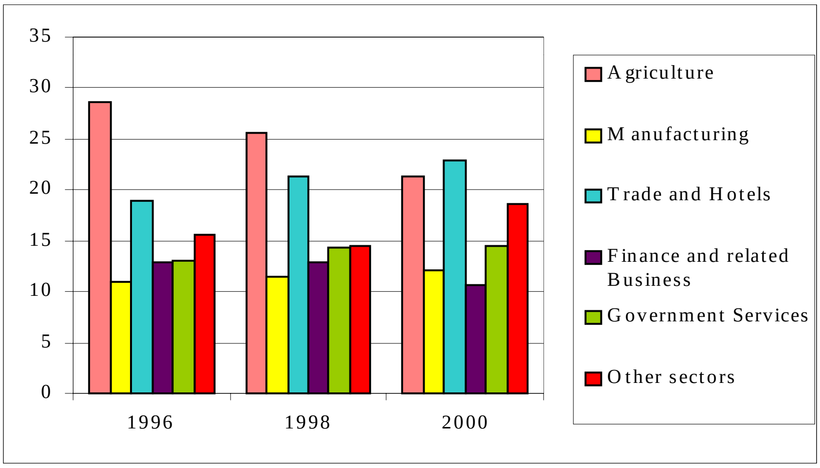
The Kenyan economy has continued to stagnate due to the recent two-year drought that ravaged almost every part of the country.

The Kenyan economy has continued to stagnate due to the recent two-year drought that ravaged almost every part of the country. Nominal GDP shrank by 0.2 percent in 2000 and growth in 1999 was only 1.3 percent.[1] Following the implementation of the macroeconomic policies outlined in the current Poverty Reduction Strategy Paper (PRSP) and induced by the IMF Poverty Reduction and Growth Facility, it is expected that economic growth will pick up in 2001, so long as current high petroleum prices stabilise and the current rains continue.

Following the implementation of the macroeconomic policies outlined in the current Poverty Reduction Strategy Paper (PRSP) and induced by the IMF Poverty Reduction and Growth Facility, it is expected that economic growth will pick up in 2001.

At Independence in 1963, one of the government's key objectives was to increase agricultural production by both small and large-scale farmers. This resulted in supply-inducing pricing policies, the provision of extension services for crop and animal husbandry, and credit schemes for farmers. To assist in the processing and marketing of agricultural produce, especially for small-scale farmers, the co-operative movement was strengthened. The participation of the African population in commercial agriculture also increased significantly. By the end of 1990, small-scale farmers accounted for about two-thirds of the coffee crop, 50 percent of tea, and almost the entire production of sugar-cane. The share of monetary agricultural production was 16 percent of total domestic production in 1963, increasing to 30 percent in 1990. Major agricultural exports are tea, coffee and horticultural products of which only horticultural products are maintaining growth.

Chart 1: Kenya - Shares in GDP at Factor Cost (Current Prices)



Source: Economic Survey, 2001

Unfortunately, due to a combination of poor rural infrastructure, bad weather, mismanagement of the co-operative sector and poor world commodity prices, the sector's share in GDP has been declining steadily in the late 1990s (see chart 1), falling to 29 percent in 1996 and to an all-time low of 22 percent in 2000. The contribution of the manufacturing sector to GDP increased significantly in the same period, rising from about 10 percent in 1963 to nearly 15 percent in 1990. Food, beverages and tobacco, chemical and petroleum products, and metal products have dominated manufacturing production. Other products that have increased in importance over the period include textile products, leather and rubber products, and cement, clay and glass. By end of 2000, manufacturing accounted for 12 percent of Kenya's GDP. The mining and quarrying sector is still underdeveloped and mineral products account for only 10 percent of total GDP.

The tourist trade has gained increased importance in the Kenyan economy since 1963. At the time of independence, the contribution of this sector to the national economy was minimal. Today the sector is the third most important, accounting for nearly 23 percent of total annual national output. Moreover, with the weak performance of coffee and tea over the last three years, due to the slump in world prices for these crops, the sector has become the country's leading foreign exchange earner. The phenomenal expansion of this sector reflects not only the diverse tourist attractions that Kenya boasts, but also the impact of an appropriate exchange rate policy, which has made the country relatively competitive as a tourist destination. Even more important has been the enormous investment that the country has undertaken in infrastructure facilities such as international standard hotels and roads connecting national parks to the main urban centres.

Despite the slow growth of the economy, services such as banking, insurance and business have also expanded. Real-estate services have also grown substantially over the period.

Despite the slow growth of the economy, services such as banking, insurance and business have also expanded. Real-estate services have also grown substantially over the period, largely reflecting the rapid expansion that the country has experienced in its urban population. Altogether, the contribution of these services to GDP has increased significantly.

2.1.2 Socio-Economic Indicators

The provisional results of the 1999 Population and Housing Census indicate that Kenya has a population of 28.7 million.[2] Kenya's estimated 2.4 percent annual population growth rate translates into a high annual demand for new jobs. It is estimated that 500,000 new jobs are needed per year to absorb the growing labour force. In 2000, an estimated 980,000 males and 398,000 females were engaged in regular wage employment. Small and micro enterprises, known as "*Jua Kali",* employ approximately 64 percent of all Kenyan workers and thus play an important role in the economy. Preliminary results of the 1997 Welfare Monitoring Survey (WMS) show that the incidence of rural food poverty was 51 percent, while overall poverty reached 53 percent of the rural population with the number of poor increasing from 3.7 million in 1973 to 11.5 million in 1994 and 12.5 million in 1997. This figure is estimated to have reached some 15 million in 1999.[3]

According to evidence on health status, an overwhelming majority of the poor cannot afford private health care (76 percent in rural areas and 81 percent in urban areas) and rely on public health facilities. Of the urban poor, 13 percent have never attended school at all. The comparative rural figure is 29 percent. Over 50 percent of Kenya's households do not have access to safe drinking water.[4]

2.2 Market Structure and the Nature of Concentration

The current pricing behaviour of large firms in Kenya suggests that they enjoy more market power than their counterparts in developed countries.

No formal analysis has recently been published[5] into Kenya's market concentration and performance in terms of e.g. four firm concentration ratios - CR4 (which is the proportion of output originating from the four largest enterprises) or using the Herfindahl-Hirschman index[6]. The last census of industrial production took place in 1982 and remains unpublished. Hence, Annex 2 gives an indication of the nature of competition in the Kenyan economy in 1992 and 2000. Whereas in 1992, there were a few activities (importation of petroleum, cement production and telecommunications) where there were public monopolies, the situation had drastically changed by 2000. The import of petroleum is now firmly controlled by eight firms, of which four multinational petroleum companies control almost 80 percent of the market. A few multinational firms also control banking and it is estimated that the top four banks control 65 percent of the annual credit and assets for the sector.

The current pricing behaviour of large firms in Kenya suggests that they enjoy *more* market power than their counterparts in developed countries. This is especially the case since it is likely that the market shares of the largest firms are generated by the presence of entry barriers, and concentration is thriving upon the sustainability of collusive arrangements. Simulations of an industrial evolution model with non-competitive market structures verify that where such conditions exist, concentration is positively related to market power and monopoly rents.[7] In Kenya, one sub-sector that currently bears this out is petrol retail where petroleum companies seem to raise prices almost on a monthly basis.

High concentration in some sub-sectors of the Kenyan economy need not mean that monopoly power is greater there; it may simply reflect the fact that the Kenyan market is small.

High concentration in some sub-sectors of the Kenyan economy need not mean that monopoly power is greater there; it may simply reflect the fact that the Kenyan market is small. However, the relatively large mark-ups of some large firms that are observed in Kenya cannot be interpreted as unambiguously reflecting their relative efficiency, and some monopoly power is certainly exercised.

While the combination of a high degree of industrial concentration and high barriers to entry does not automatically lead to abuse of market power by monopolists and oligopolies, the scope for exercising such power exists.

In Kenya it is known that many major industrial groups have close relations with each other, either through direct equity holdings or through cross directorship, indicating further concentration of ownership and/or control. There have been significant barriers to entry in Kenya in the past. Industry structure barriers such as limited supplies of raw materials, economies of scale and scope, product differentiation and brand loyalty are some examples. The existence of many of these barriers was facilitated either by government regulations and/or the smallness of the domestic market combined with a high level of protection. While the combination of a high degree of industrial concentration and high barriers to entry does not automatically lead to abuse of market power by monopolists and oligopolies, the scope for exercising such power exists.

2.3 The Public Sector

Measured as the ratio of government consumption expenditure to total consumption in the economy, government size in Kenya has gravitated to around 19 percent in the 1990s. In terms of the public sector, table 1 shows that central government employment has been gradually declining from 486,000 staff in 1997 to an estimated 466,000 in 2000 mainly due

Table 1: Kenya: Employment in the Public Sector				
	1997	**1998**	**1999**	**2000**
Total Population of Kenya (million)	27.1	27.9	28.7	29.3
Central Government ('000)	219.1	214.1	208.5	204.2
Local Government ('000)	74.9	77.1	78.8	80.2
Government Total ('000)	**321.1**	**319.1**	**316.0**	**313.7**
Wholly-owned parastatals ('000)	112.8	108.9	105.2	104.3
Majority-owned parastatals ('000)	52.3	49.9	48.5	48.4
Total Public Employment ('000)	**486.2**	**477.9**	**469.7**	**466.4**
Compared to:				
Informal Sector Employment ('000)	2,986.9	3,353.5	3,738.8	4,150.9
Formal Private Sector Wage employment ('000)	946.8	969.0	990.3	1,002.9

Source: Economic Survey, 2001

to the on-going civil service reform programme.

The reduction in government involvement in economic activities has particularly manifested itself in the divestiture of state-owned enterprises (SOEs), popularly known as parastatals. The concept of "structural adjustment" comprising a set of economic reform policies, and the promise of donor support for these economic reform programmes, was introduced in 1979. The basic objectives of the SAPs, as initially conceived, were *inter alia*, to achieve efficiency gains. This was to be achieved through greater reliance on market forces and the private sector; by reducing the role of the government in the economy through phasing out public sector monopolies in specific markets such as the supply of agricultural inputs and outputs, credit, and foreign exchange; and the privatisation of commercial state enterprises.

A report by a GoK* Working Party on Government Expenditures *characterised SOEs as highly inefficient due to government pressure to carry out public, non-commercial functions and to employ an excess labour force; due to protection from competition; and because of declining standards of management and financial control, and a lack of proper budgetary review.

As early as 1982, a report by a GoK *Working Party on Government Expenditures* discussed the problems of SOEs. It characterised them as highly inefficient due to government pressure to carry out public, non-commercial functions and to employ an excess labour force; due to protection from competition; and because of declining standards of management and financial control, and a lack of proper budgetary review. The report recommended the formation of a committee to oversee the divestiture of SOEs. This committee was established in 1983 and continued to operate until 1987, but it failed to divest any SOEs. Consequently, the SOE sector continued to expand in the 1980s rather than contract, and accounted for 11 percent of GDP by 1990.

A programme of enterprise reform and privatisation was finally announced in 1991 prior to which efforts to reform primarily agricultural parastatals had been incorporated in some of the sectoral adjustment credits of the late 1980s, but with very limited results. The 1991 programme was the first acknowledgement by the government that the problem was a comprehensive one, involving the entire sector, which had by then expanded to include some 240 enterprises. Of these 240 enterprises, 207 were to be divested, and the remaining 33 were to be retained by the government as "strategic." The programme of divestiture has developed in fits and starts as exemplified by the current lethargy in selling off the government's stake in *Telkom Kenya,* the fixed-line monopoly telephone operator.

2.4 The Role of Foreign Investment

Kenya was a popular investment destination in the decade before and after independence in 1961. This situation was conducive to the first wave of foreign investment under the import substitution strategy. Since the I990s, however, macroeconomic instability and growing political uncertainties have been deterrents to foreign investment as clearly reflected in chart 2 and table 2 below.

Chart 2: East Africa - Comparative FDI

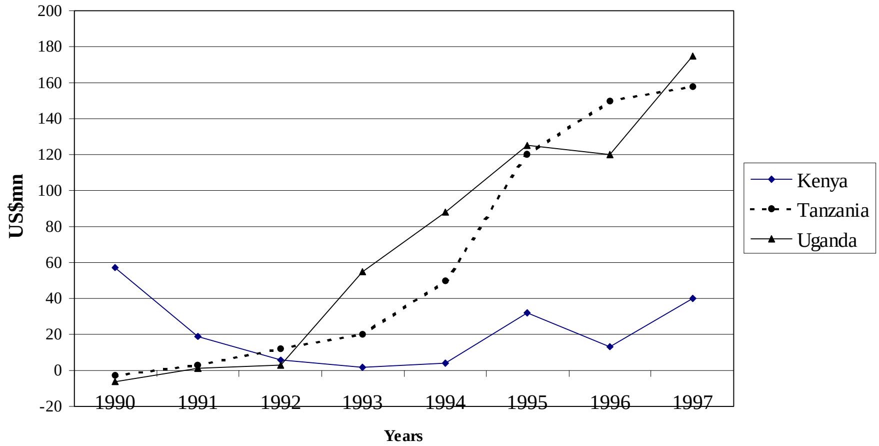


Table 2: East Africa - FDI Inflows, 1990-1998					
	Cumulative Total (US$ million)	Cumulative Total per capita ($)	Annual Average FDI (US$ million)		Annual Average FDI Inflows as a % of GFCF
	1990-98	1990-98	1990-95	1996-98	1993-97
Kenya	215	7	20	32	1.0
Tanzania	682	21	34	160	9.0
Uganda	771	37	44	168	13.1
Source: Adapted from World Investment Report, 1999					

From the point of view of investors[9], the key negative trends that the government needs to pay attention to include inappropriate government spending, particularly leaving Kenya's former good infrastructure and educational systems to decay; the high regulatory burden on business, which reduces its competitiveness; and the lack of enforcement of regulations.

Whereas Uganda attracted an average annual FDI of US $168 million between 1996 and 1998 with Tanzania following closely at US$160 million, Kenya only managed to scrape together US$32 million. In terms of importance of incremental FDI, its contribution to gross fixed capital formation was a miniscule one percent compared to 13 percent for Uganda. The latest[8] published figures show that net foreign direct investment, as a share of GDP was only 0.1 percent for Kenya, 3.5 percent for Uganda and 2.1 percent for Tanzania in 1999. From the point of view of investors[9] , the key negative trends that the government needs to pay attention to include inappropriate government spending, particularly leaving Kenya's former good infrastructure and educational systems to decay; the high regulatory burden on business, which reduces its competitiveness; and the lack of enforcement of regulations. Hence, Kenya's most pressing challenge in attracting FDI is to restore the institutions and infrastructure that buoyed its initial economic growth. General law enforcement, and thus the physical security of people and property, and judicial support for commercial contracts have worsened over time and need to be improved.

2.5 Export Orientation

Kenya is a relatively open economy. Compared to a national GDP of KSH464 billion in 1995 (market prices), total international trade totalled KSH253 billion. The low growth of the economy between 1996 and 2000 had repercussions on the marginal growth of international trade whose value also marginally increased to KSH317 billion in 1999 (only six percent annual period growth at market prices). In the 1990s, Kenya's share of merchandise exports in total exports has remained at around 45 percent, of which fuels, minerals and metals comprise 16 percent, other primary commodities 67 percent, and manufactured exports 17 percent of total merchandise exports respectively. Sectorally, Kenyan output is export oriented. A recent study (see Mengistae and Teal, 1998) shows that the food sector is most export oriented with 60 percent of output exported (see table 3 below).

Though large firms in Kenya tend to export more, even small firms export a respectable 26 percent of output.

Though large firms in Kenya tend to export more, even small firms (defined as those firms which employ under 50 employees) export a respectable 26 percent of output. Taking Zimbabwe as a base in terms of relative efficiency of exporting firms (Zimbabwe = 100), Kenyan exporting firms are more efficient than non-exporting firms (with an index of 152 compared to 132). Most exports are destined to other African countries and indeed in 1999, 46 percent of all export earnings came from other African countries of which 61 percent came from Tanzania and Uganda alone. In terms of imports, the major share of non-oil imports originate from Europe, with only 11 percent coming from other African countries.

Table 3: Kenya - Indicators of Export Orientation, 1998

	Food	Textile and garments	Wood and furniture	Metal Working and Machines	All Sectors
Export Orientation by Sector					
No. of firms surveyed	32	45	44	47	468
% share of sampled firms that export	22	16	18	34	23
% of output exported for exporting firms	60	25	24	21	30

	Large	Medium	Small	All firms
Export Orientation by Firm Size				
No. of firms surveyed	36	48	84	168
% of output exported for exporting firms	33	24	26	30

	Exporting firms	Non-exporting firms	All firms
Relative Efficiency of Exporting Firms (Zimbabwe = 100)	152	132	119

Source: Adapted from Mengistae, T, and Teal, F, (1998), tables 12, 13, 16.

CHAPTER-III

Public Policy Context

3.1 Industrial and Trade Policy

3.1.1 Background

Kenya's trade policy is closely intertwined with its industrial policy. The 1979-83 Development Plan for Kenya set out the country's outward-oriented industrial development strategy, which was effected by the World Bank industrial sector policy operation. This became Kenya's first Structural Adjustment Credit (SAC I). The focus was on reducing protection of the manufacturing sector and promoting manufactured exports. The primary policy actions were replacement of quantitative restrictions on imports (QRs) with equivalent tariffs and rationalisation of the tariff structure to reduce the wide variations in effective protection of different industries. In November 1981 the Government of Kenya adopted a programme for the removal of QRs practised through "no-objection certificates" from domestic producers. A phased replacement of QRs with equivalent tariffs, and subsequent tariff reductions and rationalisation were implemented. At the same time the level of export compensation, intended to offset tariffs and other taxes on imported inputs, and established in 1974 at 10 percent, was raised to 20 percent.

Kenya's trade policy is closely intertwined with its industrial policy. The 1979-83 Development Plan for Kenya set out the country's outward-oriented industrial development strategy, which was effected by the World Bank industrial sector policy operation.

However, with the fiscal and balance of payments deficits not yet under control, trade liberalisation had to give way to macroeconomic stabilisation and the programme was suspended in mid-1982. Export compensation was restored in December 1982, but at the original rate of 10 percent. The remaining components of the trade liberalisation programme were reinstated in late 1983 but progress from that point was slow; QRs still applied to approximately 50 percent of imports in 1986 and rates of effective protection had been modified only slightly. The removal of no-objection certificates was the one clear success of SAC I. Whether it was wise to push for a rapid pace of import liberalisation in the face of large macroeconomic imbalances, and at a time when the exchange rate was not yet being used to close the trade gap is questionable, especially given that the early, modest nominal devaluations were overwhelmed by domestic inflation.

3.1.2 Export Performance

The share of exports of goods and services in GDP, which had declined steadily from 45 percent in the mid-1960s to around 30 percent in 1980-81, fell further during 1980-85. This weak response was undoubtedly due in large part to the global recession of the early 1980s, but must also be attributed to the limited amount of import liberalisation and export incentives actually implemented and the on-off nature of the reform process. The second push to liberalise the trade regime began in 1988 and was more successful. *Sessional Paper No 1, 1986* made a strong case for export-promotion over import-substitution. In addition, in 1986 studies had revealed better information on the structure of industry and levels of effective protection. Steady progress was made in eliminating QRs and in reducing tariffs. Between 1987/88 and 1997/98 the maximum tariff was reduced from 170 percent to 25 percent, the number of tariff bands was reduced from 24 to 4, and the average tariff was lowered from 49 percent to 17 percent.

A more active exchange rate policy was implemented in the second half of the 1980s. Kenya's terms of trade declined by about 50 percent from the mid-1970s to 1990. This was partially offset by a 40 percent depreciation in the real exchange rate between 1985 and 1990. Export compensation was raised again to 20 percent in 1985 and manufacturing under bond was introduced in 1988. In this period there was a strong supply response to liberalisation; between 1986 and 1991 the quantum index of exports rose on average by 10 percent per year.

3.1.3 External Trade and Forex Licensing

The area that proved most difficult to reform was the import and foreign exchange licensing system. The licensing procedures, involving both the Ministry of Commerce and the CBK, were cumbersome and open to rent seeking. Long delays in issuing both import and foreign exchange licenses led to the build-up of a queue of applications in the late 1980s and to the defensive reaction in the business community of submitting multiple applications for the same imports. The inability of the authorities to meet all legitimate requests for foreign exchange forced businesses to hold large inventories, which raised costs. The inability to obtain foreign exchange for remittance of dividends to foreign shareholders was a constant source of frustration for foreign investors. Subsequent partial foreign exchange liberalisation measures, while welcomed by the business community, did not attack the fundamental structure of the import and foreign exchange licensing system. This fundamental reform came about as part of the wave of trade and domestic market liberalisation and financial sector reforms that began in mid-1993, on the heels of the financial crisis in the first half of that year. Within a year of the initiation of these new reforms virtually all transactions in both the current and capital accounts of Kenya's balance of payments had been fully liberalised.

The area that proved most difficult to reform was the import and foreign exchange licensing system. The licensing procedures, involving both the Ministry of Commerce and the CBK, were cumbersome and open to rent seeking.

Currently, Kenya is amending some pieces of its legislation, including legislation on anti-dumping, countervailing duties and intellectual property rights, to bring them into conformity with the WTO Agreements. As part of the recently launched IPRSP, the government is continuing the rationalisation of the trade regime, aiming to render it less distortionary as well as more predictable and transparent. In the area of manufacturing, domestic production will be supported through marked reductions in the duty rates on raw materials and other inputs into manufacturing to bring them into line with the equivalent tariffs of major regional partners. Tighter supervision will also be applied to Common Market for Eastern and Southern Africa (COMESA) trade to ensure that the rules are being followed and that Kenyan exports are getting fair access to the markets of COMESA members. Anti-dumping legislation will be enforced to ensure fair competition for Kenyan products. Over the medium-term, efforts will be made to harmonise, rationalise, and reduce tariff structures within the region. In the meantime, duty exemptions will be minimised and areas of discretion reduced to address bureaucratic delays, avoid revenue loss, and reduce opportunities for corruption.

3.2 Policy for Promotion of Small and Micro Enterprises (SMEs)

Government policy on the promotion of SMEs must be seen within a background of the unemployment problem in Kenya. Providing an environment to stimulate sustainable job creation in the sector will be the key issue in the management of the Kenyan economy over the coming years.

GoK recognises the importance of the informal sector in employment creation, income distribution, and the rural-urban balance. *Sessional Paper No 1, 1986* highlighted informal and small-scale enterprises as the primary vehicle for social and economic development. Successive National Development Plans have given prominence to the informal sector and have proposed that the government take on a facilitative role. *Sessional Paper, No 1, 1992* "Small Enterprise and Jua Kali Development in Kenya", sets out a comprehensive policy framework for development, covering direct assistance to small enterprises; the transition of micro- and small-scale enterprises into medium-sized enterprises; access to credit for the informal sector; access to information on markets and technologies; and an enabling policy environment which would redress existing regulatory restrictions.

Providing an environment to stimulate sustainable job creation in the sector will be the key issue in the management of the Kenyan economy over the coming years.

A recent study[10] shows that between 1992 and 1997, access to credit in Kenya, as measured by the percentage of households sampled who have access to financial services - has risen, from 13 to 25 percent. This increase was both supply- and demand-led: the increase in the density of NGOs supplying micro-finance was due partly to the spread of the green revolution in maize, horticulture and small grains and the growth of rural non-farm industries. Access to credit by the poorest income groups - the 10 percent at the bottom of the income distribution - did not increase over the same period. This trend still stands, with access to credit being quoted as the single biggest business problem facing small and micro entrepreneurs.

3.3 Fiscal and Monetary Policies

The government's growing fiscal problems were analysed as early as 1982 by a Working Party on Government Expenditure which analysed the expansion in overall government spending, the rising share of the wage bill, and growing inefficiency in the public sector, including the public enterprises. The report made a strong case for improved fiscal management, and recommended that the bulk of the fiscal adjustment should be achieved through expenditure reductions and more reasoned public investments.

The government's growing fiscal problems were analysed as early as 1982 by a Working Party on Government Expenditure which analysed the expansion in overall government spending, the rising share of the wage bill, and growing inefficiency in the public sector, including the public enterprises.

Following IMF lending operations the entire policy framework emphasised macroeconomic stabilisation through fiscal, monetary and exchange rate management. The strong stabilisation programme from 1982 to 1984 sharply reduced the fiscal deficit, but in the second half of the 1980s the government was less successful in managing fiscal policy. IMF programme targets were often not met, the fiscal balance deteriorated, and inflation accelerated. Some observers have characterised the first half of the 1980s as stabilisation without much structural adjustment and the second half as structural adjustment without adequate stabilisation. Fiscal policy weakened further in the early 1990s, with the fiscal deficit rising to over seven percent of GDP in the fiscal year 1993. However, since that time the deficit has been substantially reduced, averaging only 1.2 percent over fiscal years 1995-1998. According to the recently published PRSP[11], the government deficit and financing strategy aims to focus on eliminating the deficit by 2003/04. Domestic debt is expected to decline from 20.8 percent of GDP in June 2001 to 15 percent in June 2004. Over the same period, external debt should decline from 49 percent of GDP to 42 percent, despite an increase in the overall level of borrowing.

Monetary policy was both rigid and passive throughout the 1960s and 1970s. Interest rates were fixed and the Central Bank of Kenya (CBK) had as its primary function the accommodation of the deficit financing requirements of the government through the sale of Treasury Bills. Finally, in the 1980s the government and the CBK adopted a more flexible and market-based interest rate policy, with more frequent adjustments in saving and lending rates to reflect inflation. From 1984 real lending rates remained positive. One of the objectives of the World Bank's 1989 financial sector SECAL was the full liberalisation of interest rates. By 1990 the minimum rate on savings had been raised to 12.5 percent and the maximum lending rate to 19 percent, but with banks permitted to charge additional fees, which meant that lending rates were *de facto* free. Treasury Bill rates were allowed to float from November 1990, and in 1991 all interest rates were fully deregulated.

Despite the progress made on interest rate deregulation, other aspects of monetary policy and monetary management deteriorated in the late 1980s and early 1990s.

Despite the progress made on interest rate deregulation, other aspects of monetary policy and monetary management deteriorated in the late 1980s and early 1990s. The quality and effectiveness of bank supervision declined, adherence to prudential regulations was lax, a number of smaller banks failed and had to be put into receivership, or were propped up with public funds, and growth in the money supply began to outpace demand. In the second half of 1992 the money supply expanded at an annualised rate of 63 percent (for the full year growth was 34 percent) against an IMF programme target of 10 percent, fuelling the inflation that peaked at an annualised rate of 101 percent in the second quarter of 1993. As the money supply/inflation situation appeared to be spiralling out of control in early 1993 the government initially rejected IMF advice to mop up excess liquidity by selling Treasury Bills at a fixed interest rate of 45 percent, but two months later opted to auction Treasury Bills at market-determined rates which briefly soared to over 80 percent. By late 1993 the financial crisis was contained and Treasury Bill rates had declined to the 20 to 30 percent range where they remained for a long period before falling further to 7 to 15 percent in 1999. Currently they are in the 10 to 12 percent range mainly due to the conversion of a proportion of domestic debt into long-term stocks of 10 to 20 years.

3.4 The Financial Sector

Kenya's financial sector is moderately control-free, having removed controls on interest rates in 1983. It has been through a World Bank financial sector reform programme, which had the same policy prescription: deregulate interest rates and attempt to keep them positive in real terms; eliminate credit subsidies; broaden the range of financial liabilities offered by the government and private companies; and increase the share of the private sector in financial markets. However, prudential regulation did not keep pace with the speed at which banking institutions were created, and in 1986 the country experienced a serious banking crisis requiring the closure of several banks and the restructuring of half a dozen others. The formal large-scale sector does not have problems in accessing credit from the financial sector. Indeed the blue-chip companies raise capital through commercial paper at rates well below even the benchmark Treasury Bill rate. In Kenya, it is small and medium size firms who face the problem of access to credit.

3.5 Policies Relating to FDI

The Government of Kenya encourages foreign direct investment, and multinational companies make up a large percentage of Kenya's industrial sector.

The Government of Kenya encourages foreign direct investment, and multinational companies make up a large percentage of Kenya's industrial sector. Particularly since 1994, the government has sought out investment through the Investment Promotion Centre (IPC), which was created in 1982. However, investment flows have been declining. For example, in 1990, total net private capital flows were US$124 million while foreign direct investment was US$57 million. By 1997, the figures had declined to negative flows of US$87 million, and US$20 million respectively[12]. There are various reasons to explain this trend. Firstly, the domestic and external debt overhang has affected the domestic interest rate structure leading to a wait-and-see attitude by private investors, particularly foreign investors. Secondly, policy uncertainties and political risk have increased the perception that foreign investors might lose their investments, despite the existence of an Act to protect foreign investment. Lastly, the lack of complementary public expenditure, especially towards infrastructure, and the generally depressed economic activity, have reduced the return on investments, thereby making investment unattractive at the moment.

An investment code has been in the works since 1994. The code will set forth guidelines on investment, enumerate the various investment incentives and mandate that all new projects obtain IPC approval.

Foreign investment is not routinely screened. Nevertheless, investors may choose to take advantage of the one-stop office of the IPC, previously run under the Ministry of Finance and Planning, and an independent agency since 1986. The IPC sets minimal environmental, health and security requirements for its projects. An investment code has been in the works since 1994. The code will set forth guidelines on investment, enumerate the various investment incentives and mandate that all new projects obtain IPC approval. Efforts are underway to harmonise the investment regimes of Kenya, Uganda and Tanzania. Tariff barriers between the three East African countries have been removed, and the three Investment Authorities are in the process of harmonising investment incentives through the Investment Bill.

Kenya's view is that the introduction of an international investment code could have a negative effect on her economy. Kenya's position is therefore that negotiations under the TRIMs Agreement must take into consideration the development needs of the less developed WTO member countries.

Kenya's view is that the introduction of an international investment code could have a negative effect on her economy. It is felt that giving total freedom and rights to foreign firms under the proposed code may lead to the collapse of domestic enterprises, higher unemployment, and greater capital flight, thus leading to a balance of payments crisis. Kenya's position is therefore that negotiations under the TRIMs Agreement must take into consideration the development needs of the less developed WTO member countries.

3.6 Other Government Policies Affecting Competition

3.6.1 Agricultural Pricing and Marketing

The government had established a number of public or quasi-public institutions that operated as monopolies or regulatory bodies in agricultural markets.

An important area of Kenya's broad competition regime is the attempted reforms of agricultural pricing and marketing. The government had established a number of public or quasi-public institutions that operated as monopolies or regulatory bodies in agricultural markets. Many of these evolved from organisations created in the colonial period, such as the Wheat Board, which were established to serve the interests of the large-scale settler farmers. The most deeply entrenched of all of these institutions has been the National Cereals and Produce Board (NCPB), established in 1979 as the successor to the Maize and Wheat Boards, which for many years has been a monopoly buyer of maize, the basic food grain of the Kenyan diet, produced by large-, medium- and small-scale farmers. The NCPB monopoly was sustained by tightly restricting inter-district movement of cereals by private traders.

This has been perhaps the most difficult and contentious area of policy reform throughout the entire period of the country's structural adjustment, and the area of economic policy that has created the most misunderstanding and ill will between donors and government. It is also probably the area where the gap between agreed policy conditions and implementation has been the greatest.

However, given that the extensive interventions of government in agricultural pricing and marketing are long-standing, and are tightly linked to the basic structure of the Kenyan economy, and given that prior efforts at reducing the government role had proved unsuccessful, it is not surprising that the problems encountered during the structural adjustment period have proved so difficult for all parties involved.

Liberalisation of the grain market became stated government policy in the 1979-84 Development Plan and in a 1979 Sessional Paper on National Food Policy. Since 1992 some progress has been made in opening up the cereals trade to private traders and in reducing the role of the NCPB.

CHAPTER-IV

Scope of Kenya's Competition Law

4.1 Legislative History and Philosophy Behind the Competition Law

The Act was meant to curb the behaviour of private enterprises that might inhibit the proliferation of competitive market structures and the efficient allocation of resources, and to protect consumers in the absence of price controls.

Competition law in Kenya predates World War II, though the first formal legislation was the Price Control Ordinance of 1956 renamed the Price Control Act of 1956 and revised in 1972. This Act served as the model for the current competition law. The philosophical consideration has always been to protect consumers against price increases. Price control has been "…central to the Kenya Law" (CUTS, 1996, p2). Price controls have operated at both the production and the retail levels, depending on the commodity. Price controls on staple foods were imposed to protect lower income groups, while the main reason for price controls on manufactures was to protect against monopolistic pricing practices. Although the range of price-controlled commodities was revised in 1972, its procedures and regulations were incorporated largely into the Restrictive Trade Practices, Monopolies and Price Control Act of 1988. The Act applied to both private and public sector enterprises, but did not cover infrastructure services, the prices of which were controlled by the relevant line ministries.

The Act was meant to curb the behaviour of private enterprises that might inhibit the proliferation of competitive market structures and the efficient allocation of resources, and to protect consumers in the absence of price controls. Price controls have been reduced extensively, especially since 1986. Between 1983 and 1991, the number of controlled products under the general order fell from 56 to six, and those under the specific order fell from 87 to 29. Price liberalisation was a continuous process, and the government nimbly seized the right political and market opportunities. The reduction of price controls was geared primarily toward manufactured goods, while controls on consumer prices of staples continued, except on such items as sugar and milk. However, cost-plus pricing continued to guide price setting for prices still controlled in the manufacturing sector, and there was no provision for automatic adjustment for inflation or for price changes of intermediate inputs.

The new Act, the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya came into force in February 1989. It has since been revised but the Bill has not been tabled in Parliament.

Sessional Paper No 1, 1986 articulated the need for a market-driven economy, and may be considered as having mooted the legislation to curb restrictive trade practices and the abuse of dominance, in contrast to the existing government intervention. Partly catalysed by a 1986 regional seminar for English speaking sub-Saharan Africa on Restrictive Trade Practices[13] , the 1987 draft bill was prepared. After final deliberations it was passed by Parliament in December 1988. The new Act, the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya came into force in February 1989. It has since been revised but the Bill has not been tabled in Parliament.

4.2 Objectives, Scope and Coverage of the Competition Law

4.2.1 Objectives

The choice regarding the legal complexion of a competition system is dependent on the institutional model chosen. However, the existence of a strong legal system and economic competence in industrial organisation analysis can serve to effectively implement competition law. The objective of Kenya's competition law is to "...encourage competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and prices and for connected purposes..." (Republic of Kenya 1990:5). Kenya's competition law aims to protect the process of competition. Thus it emphasises reducing entry barriers and restrictive business practices irrespective of which groups they affect. Government agencies and professional associations are generally subject to the same set of competition laws unless exempted by an Act of Parliament (e.g. licensing for the airwaves, practising as a Doctor etc. as defined by article 5 of the Act).

4.2.2 Scope of the Law

Kenya's competition law defines a broad range of entities: 'consumers', 'customers', 'distributors', 'monopoly', 'undertakings', 'retailer', 'supplier', 'trade association', and 'wholesaler' are all defined in section 2 of the Act. The Act covers three main areas: restrictive trade practices, control of monopolies, and control and display of prices. Within restrictive trade practices (section 4-21) categories that are addressed are trade associations, discrimination in supply, predatory trade practices, collusive tendering and collusive bidding at an auction. In the area of control of monopolies and concentration of economic power, sections 22 to 32 define provisions for the control of monopolies, mergers and take-overs. Given the reduction of price controls, sections 33 to 39, which extensively define the provisions relating to price control, are now hardly ever invoked.

4.2.3 Means of Enforcement

Section 3(1) of the Act provides for the appointment of the Monopolies and Prices Commissioner while section 3(2) provides for the Commissioner's control and management of the Monopolies and Prices Department of the Treasury (currently Ministry of Finance and Planning). Section 3(3) authorises the Commissioner to delegate the exercise of his powers to any officer "subject to such limitations as the Commissioner may think fit" (Republic of Kenya, 1990:8). The Commissioner has, *inter alia,* the power to inspect premises and examine books of accounts (section 46).

Upon concluding investigations, including holding hearings, the Commissioner is required to present his report together with recommendations to the Minister for Finance and Planning who, as per section 18 of the Act, is empowered to effect orders on the control of RTPs, monopolies and pricing by way of notices in the *Kenya Gazette*.

4.3 Approach to Restraints to Trade

Kenya's competition law defines restraints to trade (RTPs), as "have the purpose of excluding others from participating in similar or other economic activities..." (Republic of Kenya 1988:1). Specific examples include refusal to sell good or services, discriminatory pricing, tied purchasing, resale price maintenance, market allocation, collusive tendering and bidding, predatory pricing etc. These RTPs are enumerated in detail in sections 6-12 of the Act.

In general, RTPs falling under section 8 of the Act (refusal or discrimination in supply) go unnoticed and unreported to the Commission. Tied purchases at the retail level are rampant e.g. in the current sugar shortage situation shopkeepers and supermarkets insist that other items must be bought together with sugar.

Table 4: Illustrative Recent RTP Cases Handled by the Commission

Case	Nature of RTP and its manifestation	Outcome
RJ Reynolds Vs BAT	Contravening Section 10(1)(a) by allegedly"…restricting RJ Reynolds from venturing into the Kenya cigarette market..."[14]. RJ Reynolds was in the process of re-entering the Kenyan market after a long absence.	The Commission investigated the case. The complainant withdrew the case after the two parties agreed on amicable coexistence in the market.
The Commission Vs Kenya Transport Association (KTA)	Contravening Section 7(1)(b) by allegedly "…recommending transport tariff charges to general cargo dealers."[15] General cargo transportation is a highly competitive sub-sector and small independent transporters drive down prices.	The Commission investigated the case. As per section 15(1)(a) of the Act, KTA was asked in writing to withdraw their recommendation. They complied.

Under the Act as it stands now, RTPs enumerated in Act fall under three main categories. Firstly, Predatory Trade Practices (PTPs) that may repress competition are declared prohibited *per se* and are enumerated under section 10. They include the following actions:

- Driving a competitor out of business or stopping the establishment of a competing business;
- Inducing a competitor to sell a business or to shut down; and
- Inducing a competitor to desist from trading or producing a good or service.

An interesting provision is that RTPs are deemed to have been committed with the intention, exclusively or partially, of accomplishing the above-mentioned purposes if any of the outcomes described above "occurs subsequent to the occurrence of the practice, or if it may reasonably be inferred that successful execution of the practice would ordinarily be followed by the outcome."

An interesting provision is that RTPs are deemed to have been committed with the intention, exclusively or partially, of accomplishing the above-mentioned purposes if any of the outcomes described above "occurs subsequent to the occurrence of the practice, or if it may reasonably be inferred that successful execution of the practice would **ordinarily be followed** by the **outcome**."[16]

Secondly, collusive tendering is covered by section 11 of the Act. The following are *per se* declared illegal:

- A group of businessmen tendering for the supply or purchase of any good or service at pre-arranged terms and/or prices; and
- Colluding to abstain from tendering for the supply or purchase of a good or service.

Lastly, collusive bidding is illegal under section 12 of the Act.

However, it has been argued[17] that restrictive trading arrangements covered by section 6 (1), while specifically declared to be RTPs, are not enforceable in legal proceedings. A typical example would be an agreement between manufacturers to sell goods at prices or on terms agreed upon between themselves (sectoin 6, 1, (b)). In terms of contract law such practices are void but not illegal. All the remaining restrictive practices, including activities of trade associations, are *per se* RTPs, which are in reality neither illegal nor void. Although no RTP can be justified on any grounds whatsoever, the categorisation used in the Act is rather confusing, and the rationale not easy to understand. In practice, this has caused confusion even in enforcement agencies. Indeed the primary challenge for the MPC is to detect such RTPs.

To effectively apply rule of reason, particularly in cases involving control of monopoly power, it is imperative that the MPC fully investigates, and proves its case.

Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement is likely to harm competition by increasing the ability or profit incentive to raise prices or reduce output, quality, service or innovation below what would prevail in the absence of the relevant agreement. To effectively apply rule of reason, particularly in cases involving control of monopoly power, it is imperative that the MPC fully investigates, and proves its case. This calls for highly skilled economists, lawyers and investigators. The MPC is only now in the process of recruiting such professionals, as will be discussed in chapter 7 below.

4.4 Approach to Dominance of Market

The Act defines monopolies and concentrations of economic power as situations where "...one, or a few firms control an economic activity to the extent that they are in a position to dictate terms and conditions on which good/services provided by them may be bought or sold" (Republic of Kenya 1988:2). In such cases the Minister is empowered to discourage market dominance through the issue of an order to divest or dispose of certain interests to counter vertical or horizontal control of economic activities.

Section 23 (4) of the Act enumerates factors that may render unwarranted concentrations of economic power prejudicial to the public interest. These factors include raising product or service costs, product prices or company profits unreasonably, reduction or limitation of competition, or deterioration in the quality of goods and services. Specific factors considered in assessing the concentration of economic power include:

The ability of the Commission to identify unwarranted concentrations of economic power and continuously review the structure of production and distribution as required by section 23(1) of the Act is unfortunately limited.

> The control of sales or supplying in excess of 33 percent of a given market. Shareholding exceeding 20 percent in a manufacturing enterprise or wholesaler while at the same time having an economic interest in the distribution or retail of the same product.

The ability of the Commission to identify unwarranted concentrations of economic power and continuously review the structure of production and distribution as required by section 23(1) of the Act is unfortunately limited. This requires annual detailed firm-level information that would enable the determination of concentration indices, preferably at the product level. It must be pointed out that the last Census of Industrial Production was in 1982 and remains unpublished.

It could be argued that the Kenyan government used to have, but has now lost, various policies that among other objectives could serve to limit the abuse of market power. The first and most important was price controls.

Prices for essential products are now left to the vagaries of the market and while price-control induced shortages are a thing of the past, the prices of even basic consumer goods are beyond the means of the majority of Kenyans. The intervention by the government to fix wages and salaries and limit the ability of firms to release workers was aimed at both the redistribution of rents and preventing inflation. Minimum wages are still prescribed by the Minister for Labour and Manpower Development, but it is generally agreed that they are well below the minimum required for a decent livelihood. The ability of firms to fire workers has also been relaxed.

Mergers and take-overs in Kenya must be consummated with the prior approval of the Minister. The criteria for determining whether mergers and take-overs are prejudicial to the public interest or not are set out in sections 30(a), (b) and (c) of the Act.

4.5 Approach to Mergers & Acquisitions (M&As)

The Act defines a merger as two or more independent business concerns dealing in the same or similar good/services combining to form one business concern. In the case of take-overs, one business acquires and controls 50 percent or more of the ownership of another business entity. Mergers and take-overs in Kenya must be consummated with the prior approval of the Minister. The criteria for determining whether mergers and take-overs are prejudicial to the public interest or not are set out in sections 30(a), (b) and (c) of the Act. The criteria include increased productivity, competitiveness and employment creation potential and/or the enhancement of capital intensive, as opposed to labour intensive technology.

Since the late 1990s there have been increasing numbers of M&As in the Kenyan economy. For example in 1999 there were 24 M&A cases compared to 23 in 1998 and 11 in 1997. The Commission attributes this increase to both the poor state of the economy which "…forced firms to combine resources in order to improve their survival rate" and "Increased awareness of the legal provisions of Cap 504 on the part of the business community"[18]. In the case of commercial banks, the Central Bank of Kenya's requirement for banks to increase their minimum capital base to KSH200 million before the end of 1999 and KSH500 million before the end of 2002 certainly played a big role in the flurry of merger applications to the Commission. In line with the outcome elsewhere[19], almost all the cases were approved.

In general, Kenyan courts do not have jurisdiction in hearing cases where Acts have not been committed on Kenyan territory.

4.6 Approach to Cross-Border Abuses and Extra-Territorial Jurisdiction

As it stands now, Kenyan Competition Law does not address cross-border abuses and extra-territorial jurisdiction. In general, Kenyan courts do not have jurisdiction in hearing cases where Acts have not been committed on Kenyan territory. Since all domestic laws in Kenya are construed as having territorial jurisdiction only, they are not applicable elsewhere. Among the major reform issues for the law would be to provide for the co-operation of Kenyan and foreign competition authorities in investigating international cartels. On the other hand in international law, States can claim extra-territorial jurisdiction in cases where they believe their legitimate interests are concerned. Such claims can be based on several principles on which courts legitimise their jurisdiction.[20] Depending on the interpretation of the law, it may be possible to conclude that Kenya's competition law does have extraterritorial jurisdiction in competition cases.

Cases concerning extra-territorial competition issues are handled only if they affect competition within the country, and cases of international M&As have been brought to the Commission.

Cases concerning extra-territorial competition issues are handled only if they affect competition within the country, and cases of international M&As have been brought to the Commission. The only case to be handled by the Tribunal involved the Kenyan merger of Price Waterhouse and

Coopers & Lybrand into PricewaterhouseCoopers (PWC). However, the recently enacted Industrial Property Act, 2001 dated August 3rd 2001 and assented on July 27th 2001 has some very important cross-border implications in its treatment of licensing, patents, government and third party exploitation of patents.

An area of general abuse by trans-national corporations (TNCs) is abuse of intellectual property monopoly. The licensing agreements of monopoly patent rights often contain restrictions, which may be uncompetitive.

An area of general abuse by trans-national corporations (TNCs) is abuse of intellectual property monopoly. The licensing agreements of monopoly patent rights often contain restrictions, which may be uncompetitive. Given that article 40(2) of the TRIPS agreement points out the possibility for such abuses, it is important that governments are able to deal with such actions in their competition laws. Unfortunately, these issues are not currently addressed in the RTPMPC Act. However, in the new Industrial Property Act (IPA), sensitivities and concerns over, for example, the availability of certain essential life-saving anti-retrovirals, has led to the wisdom of governments addressing the issue of exploitation of patented inventions by themselves or authorising third parties to do so. Hence section 80(1) stipulates as follows:

Subject to this section, where:

(a) the public interest, in particular, national security, nutrition, health, environmental conservation, or the development of other vital sectors of the national economy so requires, or
(b) the Managing Director determines that the manner of exploitation of an invention by the owner of the patent or his licensee is not competitive,

The Minister may, upon application to him in the prescribed form and after consultation with the Institute and the owner of the patent, **order** that the protected invention shall be exploited by the government Ministry, Department, agency or other person as the Minister may designate in the order, subject to the payment of adequate compensation to the owner of the patent in accordance with this section.

Sub-section 1A further authorises the Minister to allow importation or manufacture of relevant patented substances **without notice to the patent holder** under certain conditions. The Act may be seen as a very important step in addressing the issue of potential and current abuses of intellectual property rights and the important ramifications with respect to cross-border competition issues.

Bilateral/regional co-operation arrangements have been addressed under the Treaty for the establishment of the East African Community.

Bilateral/regional co-operation arrangements have been addressed under the Treaty for the establishment of the East African Community. Article 78 of the Treaty binds the three member states to prohibit agreements between undertakings or concerted practices that have as their objective or effect the prevention, restriction or distortion of competition within the Community. To the extent that regional laws are applicable extra-territorially, it is expected that multi-territorial cases affecting competition will be addressed by the East African Community Court, which has yet to be formed.

On a wider regional trading basis, COMESA, of which Kenya, is a member recognises the need for fair competition in its Free Trade Area. Work is ongoing to develop a regional competition framework and policy that is consistent with internationally accepted principles and practices. The policy will harmonise existing national competition policies in order to "…avoid contradictions and provide a consistent regional economic environment" (COMESA, 2000:16). In particular, the COMESA Court will play a critical role in the interpretation of the provisions of the policy and making sure that national laws are consistent with regional competition policy.

4.7 Checks, Balances and Sanctions

The Orders issued by the Minister require offenders to desist from prohibited practices and in very special circumstances, compensate the competitor for losses suffered by assisting in certain specified ways. The compensation is not necessarily intended to be monetary. Ministerial Orders under the Act can be appealed against at the Restrictive Trade Practices Tribunal as the first court of recourse. Appeals against the decisions of the Tribunal can be taken to the High Court of Kenya. In the era of price controls, orders of price regulation and cost determination could not be appealed against and only Parliament could annul them.

The Orders issued by the Minister require offenders to desist from prohibited practices and in very special circumstances, compensate the competitor for losses suffered by assisting in certain specified ways.

The level of fines levied under the Act is extremely low. For example, the maximum fine for the offence of practising RTPs is KSH100,000 (US$1,250) and/or a maximum prison term of two years. Prison sentences are rarely imposed. It must be pointed out that with the abolition of price controls, the hitherto severe punishments under the Act (section 59 (1)), i.e. imprisonment for up to 5 years with or without corporal punishment are no longer applicable.

CHAPTER-V

An Assessment of Kenya's Competition Law: Developmental Needs And Public Policies

5.1 Relevance of the Traditional Competition Policies of Developed Countries

What can Kenya borrow from the competition policies of the West? Even among the OECD countries, there are major differences in terms of the competition policies that they pursue, their underlying philosophies, their legislative practices, and their modes of implementation. The early US legislation passed nearly a hundred years ago took a so-called structural approach to competition policy. It viewed competition as a good thing in itself and anti-trust laws (including Federal Trade Commission (FTC) rulings and Supreme Court judgements) attempted to discourage anti-competitive practices. The spirit of this view is that the purpose of competition policy is to advance the competitive process rather than to protect the competitors. A WTO report noted that, "A guiding principle that is often referred to by competition agencies and tribunals or courts is that competition law protects competition, not competitors".[21]

A WTO report noted that, "A guiding principle that is often referred to by competition agencies and tribunals or courts is that competition law protects competition, not competitors".

Competition policy in the UK and in Western Europe has traditionally been based on a rather different philosophy. It does not regard competition as an end in itself, but a means to an end. This leads to a trade-off approach: encroachments on competition are acceptable if they are adequately counterbalanced by benefits to the community. This means a case-by-case approach to mergers rather than the promulgation of per se structural rules as in the US.

There was some convergence of competition policies in the US and the UK in the 1980s and the 1990s. The US authorities, partly due to increased international competition, started to give greater importance to the so-called "economies of scale defence" for mergers than they had previously done. Regulators in the UK, on the other hand, have started giving much greater weight to the effects of mergers or of other kinds of corporate behaviour on competition per se than to other considerations (such as regional impact) in the calculation of net social gain.

Among industrial countries, Japan has its own approach to competition questions. Although US type anti-trust laws were enacted after World War II, competition in Japan was made subservient to the country's vigorous industrial development policy. Competition theory and practice of competition policy during the Japanese catch-up process in the 1950s and late 1960s was aimed at addressing the challenges of low levels of industrialisation and economic development.

Analysis of the different approaches to competition in the US, UK and Japan suggests that the most appropriate model, which might have useful elements for a country like Kenya from the perspective of economic growth and development, may be that of Japan in the 1950-1973 period.

5.2 Economic Theory and Kenya's Competition Policy Needs[22]

Recent advances in economic theory suggest that regulated rather than unregulated competition may be a superior strategy. Modern economic theory suggests that dynamic efficiency is best promoted by a combination of co-operation and competition between firms, rather than by maximum or unfettered competition.

In order to raise its people's standard of living, a central objective of Kenya's renewed economic development strategy as stated in the PRSP must necessarily be the promotion of long-term growth of productivity.

Of particular interest in this regard is the Japanese economy in the period 1950-1973, which achieved historically unprecedented growth. Manufacturing production grew by 13 percent annually, GDP grew by 10 percent annually, and the share in world exports of manufacture rose by 10 percent. A central role in this spectacular economic advance was played by the very high rates of savings and investment in the Japanese economy. Industrial policy was concerned with maintaining the private sector's high propensity to invest. The Japanese government's Ministry of International Trade and Industry (MITI) frequently regulated competition, for example by imposing restrictions on product market competition and encouraging mergers between leading firms in key industries. In the 1990s Korean giant conglomerates competed with each other fiercely for government support based on performance targets for exports, new product development, and technological change.

The policies adopted by these East Asian countries find endorsement in new developments in economic theory. The essential focus of competition policy in advanced countries such as the US is the promotion of allocative efficiency and the reduction of prices for consumers. However, from the standpoint of Kenya's long-term economic development, this perspective is too narrow and static. In order to raise its people's standard of living, a central objective of Kenya's renewed economic development strategy as stated in the PRSP must necessarily be the promotion of long-term growth of productivity. The pursuit of this objective of dynamic rather than static efficiency requires, among other things, high rates of investment. In Kenya's private enterprise economy, this necessitates the encouragement of investment by entrepreneurs.

5.3 Some Critical Issues on Kenya's Competition Policy Needs

5.3.1 Kenya's Competition Policy and Law

Kenya should review the concept of the optimal degree of competition as implied in its competition law, since it assumes that maximum competition is good for the country.

Kenya's PRSP has clearly set out the country's medium term objectives: growth, and poverty reduction. As stated in the previous paragraph, this requires dynamic rather than static efficiency and, among other things, high rates of investment. Kenya should therefore review the concept of the optimal degree of competition as implied in its competition law, since it assumes that maximum competition is good for the country. What the country may require is a degree of competition that would entail sufficient rivalry to reduce inefficiency in the corporate use of resources at the microeconomic level, but not so much competition that it would deter the propensity to invest.

Of course Kenya need not replicate the industrial development and competition policies of Japan and the other developed Asian countries discussed above, **but**, given that the MPC Act is under review, relevant elements of the above-mentioned long-term objectives should be seriously considered for incorporation into a revised “Competition and Consumer Welfare Act”.

5.3.2 Kenya’s Competition Law and Consumer Protection Law

A comprehensive consumer protection law has not yet been enacted for Kenya. In overall terms, certain elements of consumer protection may be considered to be covered by various aspects of Kenyan Law.

A comprehensive consumer protection law has not yet been enacted for Kenya. In overall terms, certain elements of consumer protection may be considered to be covered by various aspects of Kenyan Law. Contract law relating to the authentication of written forms, states that any written form is required by statute to be signed by the author in his or her own handwriting or for it to become legal. There is no specific law relating to data protection in transactions involving teleservices, internet sales etc.

Under contract law, one is protected as a consumer. For example a bank cannot release confidential financial information to a third party The exception is of course where the information is needed by law enforcement agencies in the case of criminal investigations. The Hire Purchase Act protects consumers from repossession of goods bought on hire purchase where the purchaser has paid at least 67 percent of the sale value.

Section 74 of the MPC Act provides for close co-ordination between the MPC and the Kenya Bureau of Standards (KEBS) in matters pertaining to specification of commodities and grading of commodities. KEBS endeavours to evaluate consumer complaints and gives assistance in resolving them, in collaboration with the suppliers of products and services.

KEBS tries to work closely with bodies such as the Kenya Consumers’ Organisation (KCO), Consumer Information Network (CIN) and a few governmental agencies which work on consumer protection.

Hence, comprehensive consumer protection should be defined to include all those measures that serve to protect the consumer’s interest in the provision of goods and services. It should have preventive aspects that include measures that regulate the supply and quality of goods and services. It should have rules relating to standards to which goods and services must conform, and it should have educational aspects targeting consumers.

The ability of the consumer to make informed choices should be the guiding principle for Kenyans “where mass production is the norm and the consumer is faced with a wider variety of goods and services and conflicting pieces of advice”

The ability of the consumer to make informed choices should be the guiding principle for Kenyans “where mass production is the norm and the consumer is faced with a wider variety of goods and services and conflicting pieces of advice” (see Mwololo, 2001). There is a need to amend the RTP Act to include consumer welfare protection and education. Consumer International’s Model Consumer Law would be a good starting point for formulating the relevant sections applicable to consumer protection.

Consumers need to appreciate the role of competition in ensuring value for money. Business needs to recognise the benefits of competition both to secure value for money inputs, and to ensure a fair market for their products; international and national consumer groups have a key role to play in this.

CHAPTER-VI

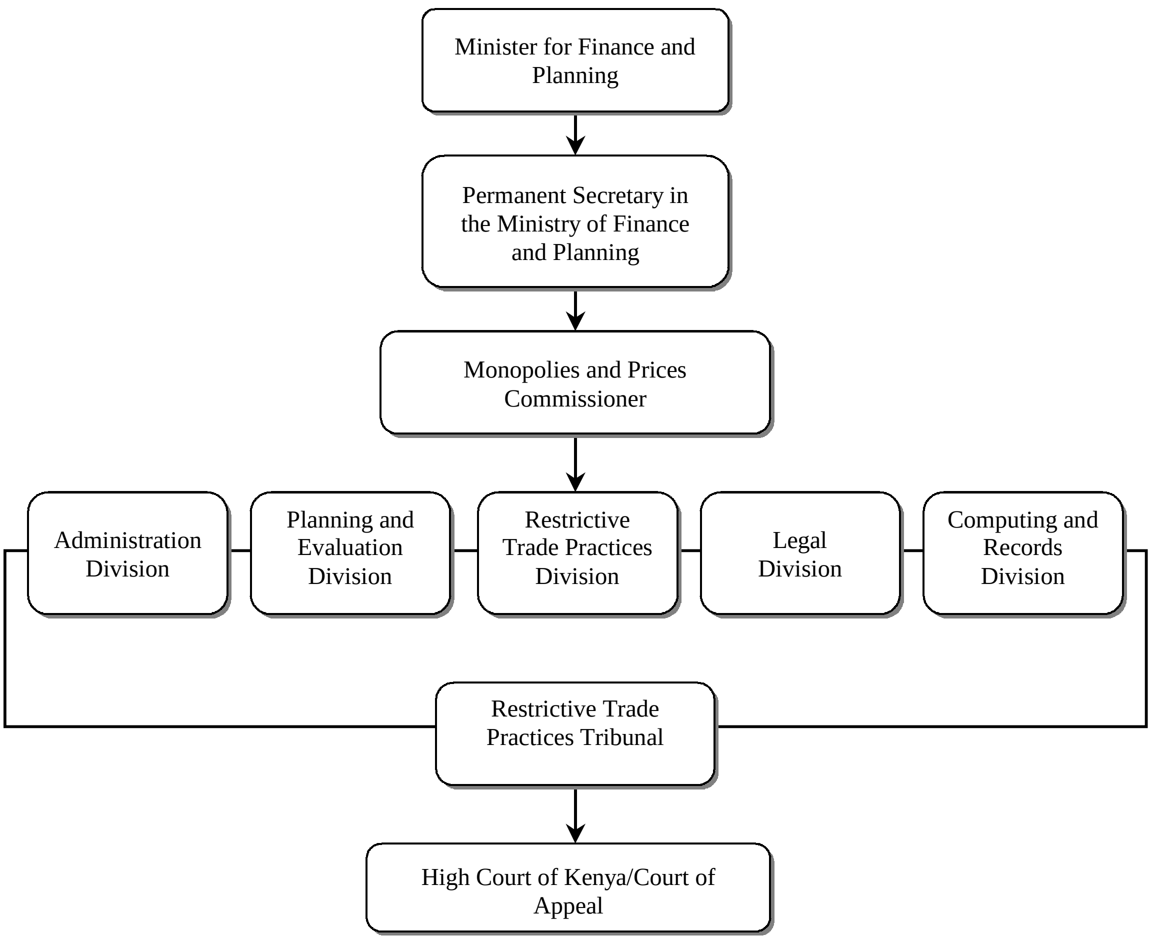
Administrative Aspects Of Kenya's Competition Law

6.1 Structure and Powers of the MPC and the Restrictive Trade Practices Tribunal

6.1.1 Structure and Membership of the Commission

The Act provides for the establishment of various institutions for the administration and settlement of disputes in relation to competition policy and fair-trading. The Commission works under the general guidance of the Minister for Finance and Planning and is administrated by the Permanent Secretary (see chart 3 below).

Chart 3: Structure of the Commission



The Restrictive Trade Practices Tribunal (RTPT) established under section 64 of the Act operates independently as the Court of first appeal, and falls administratively under the Ministry of Finance and Planning rather than the Office of the Attorney General. Its membership consists of three members plus a Chairman all appointed by the Minister for Finance and Planning and their terms are expected to end in two years time. The Chairman is an Advocate of the High Court of Kenya. The Court of Appeal of Kenya is the final court of appeal.

6.1.2 Powers and Decision-Making Procedures

Currently the Act is administered through a mixture of powers bestowed upon the Minister, the Commissioner and the Tribunal.

Currently the Act is administered through a mixture of powers bestowed upon the Minister, the Commissioner and the Tribunal. The Minister for Finance, on the technical advice of the Commissioner, has powers to make orders in all aspects of the law relating to RTPs, and control of concentration of economic power, as well as orders relating to mergers and take-overs (sections 18 and 19 of the Act).

6.2 Adjudicative and Investigative Functions

The role of the Commission is to receive complaints and investigate them while also initiating investigations and making recommendations to the Minister on what action to take on possible breaches of the Act (see Annex 3 for treatment procedures for different cases). Section 46 of the Act gives the Commissioner extensive powers of investigation, including entry into premises and inspection of premises, examination of books of account and related documents, and requiring suspects to provide information.

He has investigatory and advisory powers in relation to restrictive trade practices, concentration of economic powers, and mergers and take-overs. Section 15 (3) of the Act, can be interpreted to bestow the Commissioner with adjudicatory powers in relation to RTPs since he is allowed to enter into a consent agreement with the persons indulging in RTPs and to agree that the person will desist from the specified practices and will compensate the injured party.

The Commissioner endeavours to use moral suasion as the first line of policy enforcement. Where persuasion fails, the Commissioner prepares Ministerial Orders for the Minister to issue. The Orders issued by the Minister require the offenders to desist from the specified practices. In special circumstances the offender is required to compensate the competitor for losses suffered by assisting in certain specified ways.

There is no formal link between sectoral regulators and the MPC. Sectoral regulators are, by their very nature, supposed to be independent of the government and the other players in the sector.

The principal function of the RTPT is to hear appeals against Orders made by the Minister in the areas of RTPs, M&As and on unwarranted concentration of economic power. The procedure for submitting an appeal is clearly defined in the Act. The right to appeal against the RTP Order to the Tribunal decision is vested in the High Court of Kenya. The procedure for appealing is also adequately covered in the Act. Both the Minister and the appellant can appeal to the High Court against decisions of the Tribunal.

6.3 MPC and Sector Specific Regulatory Authorities

6.3.1 Findings

There is no formal link between sectoral regulators and the MPC. Sectoral regulators are, by their very nature, supposed to be independent of the government and the other players in the sector. They are there only to lay down the rules, and enforce them. If they are not independent, then the essence of sectoral regulatory agencies is lost. They lose the ability, and credibility, to oversee sectors. Recent developments at the Electricity Regulatory Board, the Telecommunications Commission of Kenya, the Kenya Tea Development Agency and practically all of the other sectoral regulatory agencies show the kind of pressure that regulators are placed under when the government decides to exercise undue control over them.

Some indication of an improvement can be seen in the proposal for a Kenya Coffee Marketing Authority (KCMA), which would oversee the marketing of clean coffee by private agents. Section 3.4 of the policy paper states that: "The removal of conflict of interest will be achieved through the separation of regulatory and marketing roles currently undertaken by Coffee Board of Kenya."

Since one of the strengths of the laws is that they should be industry-neutral, in principle the same framework of anti-monopoly laws should apply to all sectors of the economy.

Since one of the strengths of the laws is that they should be industry-neutral, in principle the same framework of anti-monopoly laws should apply to all sectors of the economy. That makes it easier to stay focused on the basic economic principles and values that underlie the laws. Their application would also avoid the difficulties in administering and rationalising the current patch-work of sectoral regulatory laws.

The law should however, be applied flexibly and be capable of being applied to a wide variety of contexts, from basic industries to health care and innovation markets. The basic principles should remain constant, but the rules should be flexible enough to be applied to widely different factual situations.

CHAPTER-VII

Capacity and Needs of the MPC

7.1 Infrastructure Facilities

After much personal effort by the Commissioner, the MPC recently moved into new buildings 'Anniversary Towers', which are much bigger premises than before. It occupies two floors and the premises seem to be adequate. Information Technology (IT) facilities include an internet connection, 10 computers and one photocopier. These are not enough and need to be increased. In addition, whereas there are adequate premises for a library, it needs to be a functional reference library with adequate documentation.

7.2 Financial Resources

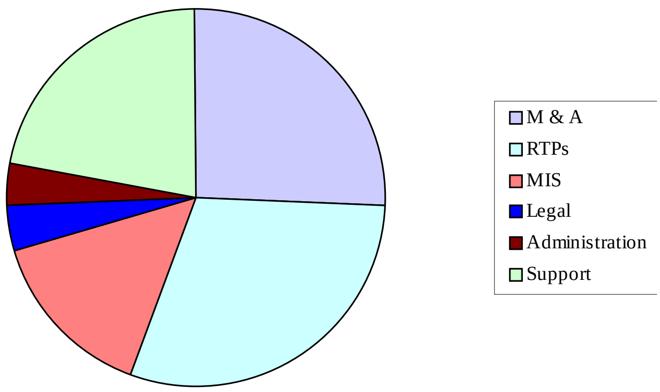
Budgetary allocations to the Commission are not enough. Between 1998/99 and 2000/01 Financial Years, the Commission has been receiving an average of only KSH17 million every year.

Budgetary allocations to the Commission are not enough. Between 1998/99 and 2000/01 Financial Years (FYs), the Commission has been receiving an average of only KSH17 million every year (approx. US$215,000 at current rates of exchange). Of more concern are the budgetary allocations for training: in 1998/99 there was no allocation for training, and only KSH600,000 was allocated in 1999/2000. As the Commissioner aptly states, it is only by substantially increasing the budgetary allocations to the Commission that it will be possible to have the Commission "…manned by high calibre and independent Competition Economists and Lawyers so as to safeguard the quality of investigations, enforcement and compliance standards…to attract and retain "top notch" professionals in these two fields" (Republic of Kenya 1999:17).

7.3 Human Resources/Staff

In 2001 professional staff at the MPC numbered 24 officers, including the recent recruitment of high calibre Deputy Commissioners in the legal and economic fields. In addition there are eight support staff. Most of the professional staff work on M&A cases (seven) and RTPs (eight). The Library and MIS employ four members of staff.

Chart 4: MPC - Staff Complement



Source: Survey results

Table 5: Professional/Technical Background					
	Economics/ Commerce/ Finance	Law	General Admin.	MIS/ Systems	Others
Member (full-time)	-	-	1	-	-
Member (part-time)	0	0	0	0	0
Professionals	22	1	-	1	-
Support Staff	-	-	-	-	6
Total	22	1	1	1	6

Source: Survey results

7.4 Autonomy of the MPC

The Monopolies and Prices Commissioner is subject to the control of the Minister and is responsible for the efficient administration and enforcement of competition law and consumer protection.

The Monopolies and Prices Commissioner is subject to the control of the Minister and is responsible for the efficient administration and enforcement of competition law and consumer protection. The RTPT set up under section 64 of the RTP Act has the principal function of arbitrating competition law disputes resulting from Ministerial Orders.

Section 68 of the Act provides for the Tribunal to direct the Minister to "reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates". Hence in general, according to the current law, the RTPT has powers to overturn, modify, confirm and/or refer back to the Minister, orders which aggrieved parties appeal against.

However, it is anomalous that the Tribunal whose members are appointed by the Minister and which administratively falls under the Ministry of Finance is empowered to hear appeals from the Orders of the Minister and can give him directions. "In that situation, it is a matter of conjecture how far the decisions of the Tribunal will be independent" (Vyas, 2001:11). Though the Tribunal was set up around 1989, so far only one appeal has gone to it. It is practically a redundant body.[23]

While it is generally agreed that the competition agencies need to be independent of political influence, in Kenya this can only be truly effective if the government's economic and industrial policies are driven by the principles of dynamic efficiency.

While it is generally agreed that the competition agencies need to be independent of political influence, in Kenya this can only be truly effective if the government's economic and industrial policies are driven by the principles of dynamic efficiency. The above is in large part a matter of political will, which should aim to diffuse competition advocacy, sustained through a national culture of competition. Competition enforcement institutions must be independent of the political set up.

The Tribunal should be given a primary role, with staff and specific powers to investigate, adjudicate and make final orders.

7.5 Capacity and Institutional Needs of the MPC

The MPC needs technical assistance to improve the government's capacity to revise and implement its competition law. Specific areas include:

- Greater access to training and education, drawing on the experience of existing competition authorities and experts involving short courses, distance learning facilities, and secondments;
- Legal assistance, not only on the revision of the Act but in the handling of specific competition cases, as part of the training and capacity building process.

The MPC needs technical assistance to improve the government's capacity to revise and implement its competition law.

More involvement by the staff in competition expert networks would be useful to co-ordinate technical assistance, and to share and disseminate experiences. This would:

- Help to maintain continuity, consistency and predictability in work outcomes;
- Contribute to technical education, strengthening the reworked MPC;
- Generate information, which could be used to increase public awareness of the benefits of competition law, for example by publishing information on the cost to consumers of specific cartel-like behaviour by quantifying the gains from their eradication.

In addition, a reliable database describing the present conditions of competition at the national level would be a key instrument, particularly for advocacy purposes. The database would aim to analyse competition at the national level through the interplay of economic variables like market size, entry barriers, etc.

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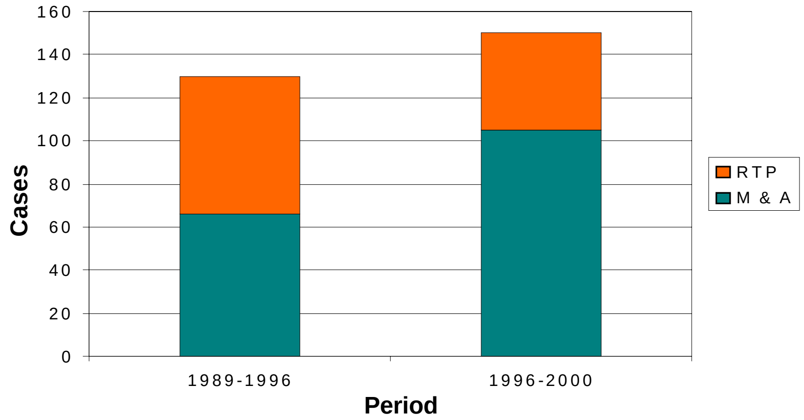
7.6 Cases Handled

The MPC handles more M&A cases than RTPs. As chart 6.1 shows, between 1989 and 2000, there were 261 cases; of which 150 were handled between 1996 and 2000. The chart also shows the absolute and relative increase in the number of M&As cases in Kenya since 1996.

Chart 5: MPC - Case Load 1989-2000



Source: Survey results

All M&A cases are brought by the firms who are interested in merging, and the vast majority of RTP cases which are brought to the MPC are brought by the private sector.

In 1999 there were 24 M&A cases compared to 23 in 1998 and 11 in 1997. The Commission attributes the increase in 1998/99 to the poor state of the economy which "…forced firms to combine resources in order to improve their survival rate..." and "…Increased awareness of the legal provisions of Cap 504 on the part of the business community…" (Republic of Kenya/Monopolies and Prices Commission, 1999:16). In the case of commercial Banks, the Central Bank of Kenya's requirement for Banks to increase their minimum capital base to KSH200 million before the end of 1999 and KSH500 million before the end of 2002 certainly played a big role in the flurry of merger applications to the Commission. All M&A cases are brought by the firms who are interested in merging, and the vast majority of RTP cases which are brought to the MPC are brought by the private sector.

The MPC produces an annual report of which about 200 copies are printed for wide distribution annually.

7.7 Advocacy and Outreach

The MPC produces an annual report of which about 200 copies are printed for wide distribution annually. The report describes the operations during the year under review, problems faced, cases handled, and staff news etc. In Kenya, press conferences are generally the purview of the political heads of government, i.e. Ministers. Hence, the Commissioner does not directly issue periodical press releases or organise press conferences. Often when there is a contentious issue, it is the Minister who issues such statements.

The authority has released educational materials for the public and businesses, in the form of a simplified guide to the Act.

Press conferences are very rarely held. However, the current Commissioner is very pro-active and his thinking is very competition-oriented. He attends many seminars and outside meetings and openly talks with professionals. Often when the press is present, the Commissioner talks to them on topical issues, but not within the framework of formal press conferences.

In addition, the authority has released educational materials for the public and businesses, in the form of a simplified guide to the Act. This has been produced and widely circulated.

Civil society, though currently not very active, has an important role to play in shaping information on consumers' rights and the integration of consumer protection issues within a consumer protection policy and law that can be legally enshrined alongside or within a revamped competition policy and law for the country.

In terms of conferences, one major regional conference on Competition was organised in conjunction with UNCTAD in Mombasa, Kenya in March 2001. The proceedings were published and have recently been circulated.

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CHAPTER-VIII

Recommendations and Conclusions

8.1 The Economy and Public Policy

The MPC needs to be able to determine current concentration and industrial performance in various sectors of the economy.

There has been no recent formal analysis of Kenya's market concentration and performance. The last Census of Industrial Production was done in 1982 and remains unpublished. Market shares of the largest firms are generated by the presence of entry barriers and concentration thrives upon the sustainability of collusive arrangements. The MPC needs to be able to determine current concentration and industrial performance in various sectors of the economy.

Protection should always be seen as a tax on consumers to protect local production. Consumer choice in terms of "cheap" imports should always be weighed against the high cost domestic production. Kenyan output is export-oriented, and the food sector is most export oriented with 60 percent of output exported. Most exports are destined to other African countries and typically 45 percent of all export earnings come from other African countries, of which 60 percent come from Tanzania and Uganda alone.

The lowering of trade barriers, removal of exchange controls and reduction in restrictions on foreign investment have, to a large extent, allowed the discipline of international competition to be exerted on domestic production.

The lowering of trade barriers, removal of exchange controls and reduction in restrictions on foreign investment have, to a large extent, allowed the discipline of international competition to be exerted on domestic production. They have also provided greater export market opportunities, expanded the relevant market for domestic firms, and widened consumer choice. Obtaining licenses and the state of infrastructure are two major problems for business. A reduction in the level of domestic regulation of business and the streamlining of procedures has only marginally reduced the cost of doing business.

Business risk has unfortunately been heightened by uncertainties associated with political governance. Increasing the size and the role of the private sector through privatisation, and encouraging parastatals to operate more commercially, has only marginally increased the degree of competition in the economy overall. However, there has been a decrease of market imperfections and the level of direct and indirect subsidisation of parastatals – even government loan guarantees for parastatals are now being charged a market rate guarantee fee by the Treasury.

8.2 Objectives and Scope of Kenya's Competition Law

The objective of Kenya's competition law is to encourage competition in the economy by prohibiting restrictive trade practices, and to control monopolies and concentrations of economic power.

The objective of Kenya's competition law is to encourage competition in the economy by prohibiting restrictive trade practices, and to control monopolies and concentrations of economic power. Kenya's competition law aims to protect the process of competition. It emphasises reducing entry barriers and restrictive business practices, irrespective of which groups they affect. The Act covers RTPs, and the control of monopolies.

Recommendations on Kenya's Competition Policy Needs

- The central objective of Kenya's competition policy and law must be the promotion of long-term growth of productivity. The objective is dynamic rather than static efficiency and requires, among other things, high rates of investment. This necessitates the encouragement of investment by entrepreneurs, and the removal of entry barriers.

- The country requires a competition policy regime that would entail sufficient rivalry to reduce inefficiency in the corporate use of resources at the microeconomic level, but not so much competition that it deters the propensity to invest.

8.3 The RTP Act and its Components

The ability of the MPC to identify unwarranted concentrations of economic power and continuously review the structure of production and distribution as required by section 23(1) of the Act is limited.

Legal experts have argued that several provisions of the Act relating to RTPs are examples of bad drafting. There are several cases of clumsy definitions in the discussion of RTPs e.g. use of indeterminate terms like "opportunities", which make interpretation amenable to legal disputes. In general, RTPs falling under section 8 of the Act (refusal or discrimination in supply) go unnoticed and unreported to the Commission. Tied purchases at the retail level are rampant, to the detriment of consumers e.g. last year's sugar shortage situation where shopkeepers and supermarkets insisted that other items must be bought together with sugar.

The government of Kenya is a major purchaser in Kenya's economy and could gain from the reductions in procurement costs and spillover effects that would result from transparency and accountability of Ministerial Tender Boards (MTB), local authorities, and public institutions.

The ability of the MPC to identify unwarranted concentrations of economic power and continuously review the structure of production and distribution as required by section 23(1) of the Act is limited. Enhanced international competitiveness and increased employment are elements of dynamic efficiency; best promoted by a combination of co-operation and competition between firms, rather than by maximum or unfettered competition, and are recognisable in Kenya's approach to M&As (section 30a).

As it stands now, Kenyan competition law does not address cross-border abuses and extra-territorial jurisdiction. Hence the MPC has not yet handled any cross-border anti-competition abuses. It is expected that multi-territorial cases affecting competition will be addressed through the East African Community Court, which has yet to be formed.

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Recommendations on the MPC Act

- Refusal to or discrimination in supply as a restrictive practice (section 8 of the Act) typically affects small-scale consumers e.g. in the case of the tied purchase of sugar as described above. There is a need for the revised RTP Act to include consumer welfare aspects of this issue so that this section of the Act can be more practically enforced.

- There is a need for more involvement of the MPC with Ministerial Tender Boards to reduce incidences of collusive tendering, as required by section 11 of the Act.

- Criteria for the refusal of M&A applications as per sections 30 b and c are not easy to prove, particularly in relation to whether principles of oligopolistic interdependence will hold after the merger. Since the late

1990s there have been an increasing number of cases of M&As in the Kenyan economy. These sub-sections should be revised in line with the tenets of dynamic efficiency, best promoted by a combination of co-operation and competition between firms.

- Before revision of the Act, the spirit of the current tendency to approve almost all M&A applications should continue.

8.4 Kenya's Competition Law and Consumer Protection Law

Section 74 of the MPC Act provides for close co-ordination between the MPC and the Kenya Bureau of Standards (KEBS) in matters pertaining to specification of commodities and grading of commodities.

A comprehensive consumer protection law has not yet been enacted for Kenya. In overall terms, certain elements of consumer protection may be considered to be covered by various aspects of Kenyan Law. Section 74 of the MPC Act provides for close co-ordination between the MPC and the Kenya Bureau of Standards (KEBS) in matters pertaining to specification of commodities and grading of commodities. KEBS endeavours to evaluate consumer complaints and gives assistance in resolving them in collaboration with the suppliers of products and services. KEBS tries to work closely with bodies such as the Kenya Consumers' Organisation (KCO), Consumer Information Network (CIN) and a few governmental agencies that work on consumer protection.

Recommendations on Competition Policy and Consumer Protection

- The ability of the Kenyan consumer to make informed choices should be the guiding principle in the formulation of a comprehensive consumer law.

- Comprehensive consumer protection should be defined to include all those measures that serve to protect the consumer's interests in the provision of goods and services. It should have preventative aspects that include measures to regulate the supply and quality of goods and services. It should have rules relating to standards, to which goods and services must conform, and it should have educational aspects to target consumers.

- There is a need to amend the RTP Act to include consumer welfare protection and education. Consumer International's Model Consumer Law is a good starting point in formulating the sections applicable to consumer protection.

- Consumers need to appreciate the role of competition in ensuring value for money. Business needs to recognise the benefits of competition, both to secure value for money inputs and to ensure a fair market for their products; international and national consumer groups have a key role to play in this.

8.5 Powers and Independence of the Commission and Tribunal

In overall terms, Kenya's judicial system is under review. Currently, the Act is administered through a mixture of powers bestowed upon the Minister, the Commissioner and the Tribunal. The Minister for Finance, on the technical advice of the Commissioner, has powers to make orders on all aspects of the law relating to RTPs, and the control of the concentration of economic power, as well as orders relating to mergers and take-overs. The Monopolies and Prices Commissioner is subject to the control of the Minister and is responsible for the efficient administration and enforcement of competition law and consumer protection.

It is anomalous that the Tribunal whose members are appointed by the Minister, and which falls administratively under the Ministry of Finance, is empowered to hear appeals on the orders of the Minister and can give him directions. Though the Tribunal was set up in 1989, so far only one appeal has gone to it.

Recommendations on Powers and Independence of the Commission and the Tribunal

An independent judicial process for competition and consumer welfare issues must be considered in the current judicial review.

Recent developments at the Electricity Regulatory Board, the Telecommunications Commission of Kenya, the Kenya Tea Development Agency and practically all of the other sectoral regulatory agencies show the kind of pressure that regulators are usually placed under when the government decides to exercise undue control over them.

While it is generally agreed that the competition agencies need to be independent of political influence, in Kenya this can only be truly effective if the government's economic and industrial policies are driven by the principles of dynamic efficiency.

The above is in large part a matter of political will, which should aim at diffusing competition advocacy, sustained through a national culture of competition. Competition enforcement institutions must be independent of the political set up.

The Tribunal should be given a primary role, with sufficient staff, and specific powers to investigate, adjudicate and make final orders.

8.6 Links between the MPC and Sectoral Regulatory Agencies (SRAs)

There is no formal link between sectoral regulators and the MPC. Sectoral regulators are, by their very nature, supposed to be independent of the government and the players in the sector. They are only supposed to lay down the rules and enforce them. If they are not independent, then the purpose of sectoral regulatory agencies being operational is lost. They lose the ability, and credibility, to oversee sectors. Recent developments at the Electricity Regulatory Board, the Telecommunications Commission of Kenya, the Kenya Tea Development Agency and practically all of the other sectoral regulatory agencies show the kind of pressure that regulators are usually placed under when the government decides to exercise undue control over them.

Recommendations on Links between the MPC and Sectoral Regulatory Agencies (SRAs)

- In principle the same framework of anti-monopoly laws should apply to all sectors of the economy since one of strengths of the laws is that they are industry-neutral. That makes it easier to stay focused on the basic economic principles and values that underlie the laws, as recommended in section 8.2.

The law should however be applied flexibly, and be capable of being applied to a wide variety of contexts, from basic industries to health care and innovation markets.

- Their application would also avoid the difficulties in administering and rationalising the current patch-work of sectoral regulatory laws.

- The law should however be applied flexibly, and be capable of being applied to a wide variety of contexts, from basic industries to health care and innovation markets. The basic principles should remain constant, but the rules should be flexible enough to be applied to widely different situations.

8.7 Capacity and Institutional Needs of the MPC

Budgetary allocations to the Commission are not enough. The current complement of professional staff is 24 officers, including the recent recruit of high calibre Deputy Commissioners in the legal and economic fields. Information Technology (IT) facilities include internet connection, 10 computers and one photocopier. These are not enough and need to be increased. In addition, a functional reference library is needed.

Recommendations on Capacity and Institutional Needs of the MPC

Technical assistance is needed to improve the government's capacity to revise and implement its competition law. This should include:

- Greater access to training and education, drawing on the experience of existing competition authorities and experts. This should involve short courses, distance learning facilities, and secondments;
- Legal assistance, not only on the revision of the Act, but also in the handling of specific competition cases, as part of the training and capacity building process.

More involvement by staff in networks of competition experts would be useful to co-ordinate technical assistance, and to share and disseminate experiences. This would:

- Help to maintain continuity, consistency and predictability in work outcomes;
- Contribute to technical education, strengthening the reworked MPC;
- Generate information, which could be used to increase public awareness of the benefits of competition law, for example by publishing information on the cost to consumers of specific unwarranted cartel-like behaviour, quantifying the gains from their eradication.

A reliable database describing the present conditions of competition at the national level would be a key instrument, particularly for advocacy purposes. The database would aim to analyse competition at the national level through the interplay among economic variables like market size and entry barriers.

NRG Meeting Summary

One of the important components of the 7-Up project was the formation of a National Reference Group (NRG) in each of the project countries. The main objectives of forming NRGs were to deliberate on the inputs prepared in each country, and to create a base for launching advocacy for a healthy competition culture. The NRGs comprised of representatives of the following categories of organisations/persons:

- Consumer organisations and other civil society organisations with a demonstrated interest in economic issues
- Experts/interested persons from academia and the media
- Business and chambers of commerce
- Competition & regulatory authorities
- Government (External Trade, Internal Trade and/or Consumer Affairs Departments)
- Politicians and/or parliamentarians
- Trade union leaders

There is a major problem in the lack of rules and principles to guide competition law.

Three NRG meetings were held in Kenya, on April 14th 2001, June 13th 2001 and October 31st 2001. The first meeting was introductory in nature and was intended to present the 7-Up project, as well as the initial findings of the study on the competition regime in Kenya. The second meeting presented the results of Phase 1 of the project. Several issues were discussed and the following conclusions were made:

- There is a major problem in the lack of rules and principles to guide competition law. This could be resolved by the crafting of principles of competition to achieve economic goals, encompassing the overall economic goals of the country.

- There is a need to address cross-border mergers and acquisitions. This is imperative because the effects of such consolidations and economic concentrations are becoming apparent in Kenya.

- Kenya requires a nucleus of competition policy and law practitioners, who should have the ability to enforce that law objectively and competently.

- Public support for the competition authority and the competitive process is required; general ignorance on consumer issues is not good for the competition process.

- The Monopolies and Prices Commission (MPC) is looking into the potential effects of electronic commerce on competition, given that electronic commerce may change the environment by raising the level of transparency in the market place.

The MPC agreed that the study had fairly accurately identified some of the challenges faced at the commission, the MPC's successes, and the status of competition policy in Kenya.

In general, the MPC agreed that the study had fairly accurately identified some of the challenges faced at the commission, the MPC's successes, and the status of competition policy in Kenya. At present, there are no legal and administrative linkages between the commission and the sectoral regulators. In addition, there is no formal linkage among the sectoral regulators themselves.

The third meeting was held on October 31st 2002 to discuss the results from the questionnaire for the second phase of the study and reach an agreement on the case studies to be done for Kenya. It was agreed that for Kenya the following sectors should be the focus of the case studies:

- International Mergers: The beverages sub-sector.
- The NRG resolved to replace the cement industry with the pharmaceutical sub-sector as the latter would inform the study much more.
- The financial services sector will form the third case study with an additional focus on competition within banking institutions.

Synopsis of the Synthesis Report

The Synthesis Report is the culmination of the work undertaken in Phase I of the 7-Up project. This synopsis provides a summary of the Synthesis Report.

The Synthesis Report is the culmination of the work undertaken in Phase I of the 7-Up project, which is a comparative study of the competition regimes of seven developing countries of the Commonwealth namely, India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia. It brings together the results and findings from the individual country reports that provide details of the structure, functioning and efficiency of the institutional framework for enforcing competition law in the country.

The synthesis compares the experiences of the seven countries, providing a benchmark by which countries can evaluate their own progress and offering an opportunity for them to learn from developments elsewhere. This synopsis provides a summary of the Synthesis Report.

The 7-Up countries differ in terms of their geographical locations, population sizes, and specific developmental challenges.

The 7-Up countries differ in terms of their geographical locations, population sizes, and specific developmental challenges. They are also at different stages in terms of the development of their competition regimes. While India has had competition legislation in place since 1969, Tanzania and Zambia first enacted competition laws in 1994 and 1995 respectively. Accordingly, the countries have different levels of experience as regards the implementation of competition policy.

Every country in the study is undergoing a process of economic reform and market restructuring. In this sense, the project countries are not only developing, but also transition countries. This process has involved liberalisation of the economy, including a reduction of barriers to international trade and reduced state involvement in commercial enterprises.

Every country in the study is undergoing a process of economic reform and market restructuring. In this sense, the project countries are not only developing, but also transition countries.

Large state-owned enterprises have been privatised and replaced by profit-driven bodies. In this context, competition policy is extremely important in order to ensure that a smooth transition towards a well-functioning market occurs, and to avoid the danger of transferring dominant market positions to private enterprises. This would ensure a broader choice of goods at cheaper prices for consumers, and an efficient allocation of the economy's resources.

As part of the more general programme of reforms many of the countries have recently changed, or are in the process of changing their competition laws. As with other policy changes, this represents a shift in emphasis away from government control (e.g. price controls) towards the encouragement of market-driven efficiency, through competition.

As part of the more general programme of reforms many of the countries have recently changed, or are in the process of changing their competition laws.

However, some of the laws include objectives that are not directly related to the promotion of competition; for example one of the objectives of the South African Competition Act, 1998, is to "promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons", and the Sri Lankan Fair Trade Commission takes the control of inflation into consideration in its activities. In general, the key objectives are efficiency and consumer welfare, with a recognition that there may be a trade-off between static and dynamic efficiency.

Three main areas are generally considered to be the core concerns of competition policy in any country:

i) Restrictive trade (or business) practices;
ii) Control of monopoly power or a dominant position; and
iii) Mergers and acquisitions.

While each of these is covered under all of the 7-Up country laws, the manner in which they are covered differs somewhat.

No country prohibits all RTPs per se, but in some countries those practices that are regarded as particularly damaging are singled out for this type of prohibition.

Most countries identify specific actions that constitute an RTP; the others give a more general definition. In several of the 7-Up countries the definition of restrictive trade practices (RTPs) is related to the idea of a horizontal or vertical agreement between firms that restricts competition. In other countries RTPs also include restrictive actions by single enterprises.

No country prohibits all RTPs per se, but in some countries those practices that are regarded as particularly damaging are singled out for this type of prohibition. All countries include a 'rule of reason' provision whereby some practices can be justified either in the public interest, or on efficiency, technological progress or export grounds. The onus is usually on the offending party to make a case for itself, though in Sri Lanka the burden of proof is reversed. It is difficult to determine the precise criteria on which 'rule of reason' decisions will be based, but this process should develop over time to provide more predictable outcomes for enterprises, while allowing competition authorities the necessary flexibility to support developmental needs and other public policy aims.

Most of the 7-Up countries adopt a two-step approach to determining the abuse of monopoly power and dominant market positions.

Most of the 7-Up countries adopt a two-step approach to determining the abuse of monopoly power and dominant market positions. Firstly, they must establish that a position of dominance exists, and secondly, they must establish that this position is being abused. A prerequisite for this process is identifying the relevant market, in terms of its 'geographical' and 'product' dimensions. Most of the laws do not provide a clear prescription for how this should be done. India's new Competition Bill, although not yet in force, will be the only competition law to specify which factors should be taken into consideration in this regard.

Once the relevant market has been determined, dominance is assessed. The major factor for determining this in all countries is market share. Although there is no one-to-one relationship between a high market share and market dominance, which makes it difficult to set a threshold, this method is used as an important indicator in jurisdictions all over the world. The levels above which dominance is presumed in the 7-Up countries fall between 30 and 50 percent. India's new Bill takes a more behavioural approach, taking into account other factors such as the size and importance of competitors, technical advantages and the overall structure of the market. It is not yet clear how much weight will be allocated to each factor.

Once it has been established that a firm is in a dominant position, the second step is to determine whether this position is being abused.

Once it has been established that a firm is in a dominant position, the second step is to determine whether this position is being abused. Dominant firms are subject to the same prohibitions as other firms, while in some cases behaviour that is legitimate for non-dominant firms is also not allowed.

The only country that does not follow the two-step approach is Pakistan. Here, once market dominance is determined it is up to the dominant enterprise to justify its position on the grounds that it contributes substantially to efficiency, technological progress or the growth of exports.

All 7-Up countries have provisions to the effect that mergers and acquisitions likely to result in situations where competition will be limited are prohibited. Requirements on pre-notification, however, differ.

Certain activities are shielded from the purview of competition law in some countries. In some cases this is because they fall under sector-specific regulatory regimes. However, the division of authority between the competition agency and the sector-specific regulator is often unclear.

Some of the laws make use of the 'effects' doctrine, whereby foreign firms can be prosecuted for violations of competition laws that have an adverse effect in the domestic jurisdiction.

Various types of sanctions and relief are provided for in the competition laws of the 7-Up nations. These include cease and desist orders, fines, imprisonment and compensation to injured parties.

In addition, the economic circumstances that prevailed in the country in 1970, when the MRTPO was enacted, led the law to prohibit excessive 'personal' market power per se. At that time there was a vast concentration of the country's wealth into the hands of 22 business families. The MRTPO set a threshold of 300 million Pakistani Rupees, above which an individual's assets are deemed to constitute an undue concentration of economic power. The remedy in these cases is divestiture of ownership.

All 7-Up countries have provisions to the effect that mergers and acquisitions likely to result in situations where competition will be limited are prohibited. Requirements on pre-notification, however, differ; Pakistan requires that all mergers are notified to the authority; Kenya, Tanzania and Zambia require that all horizontal combinations are notified and approved (this limits their scope to deal with cases of vertical mergers with anti-competitive implications); South Africa requires pre-notification above a certain threshold; and India requires no pre-notification in either the existing Act or the proposed Bill. In Sri Lanka all mergers are notified, though the law actually only requires this in cases where combinations result in either the acquisition of a dominant position, or the strengthening of an existing one. The policy towards pre-notification has significant implications for the workload of competition agencies. In South Africa, this was part of the motivation for the amendment that introduced the threshold below which notification is not required.

In addition to the three main areas, some of the laws include provisions on unfair trade practices or consumer protection. In other countries these are covered under separate consumer protection laws, although Kenya and South Africa do not have any legislation covering either area.

Certain activities are shielded from the purview of competition law in some countries. In some cases this is because they fall under sector-specific regulatory regimes (this applies to many utilities, which are regarded as natural monopolies), however, the division of authority between the competition agency and the sector-specific regulator is often unclear. Both the Kenyan and the Indian governments have wide powers to exempt any enterprise that performs a 'sovereign duty'. Pakistan's Monopolies and Restrictive Trade Practices Ordinance specifically exempts all state enterprises. In South Africa firms can apply to the Competition Commission for exemption for a specific practice on various grounds, including the maintenance or promotion of exports or preventing the decline of an industry.

Some of the laws make use of the 'effects' doctrine, whereby foreign firms can be prosecuted for violations of competition laws that have an adverse effect in the domestic jurisdiction. However, as in the rest of the world, even where specific provisions for extra-territorial abuses are included this is not a guarantee that they will be effective in dealing with them. The South African Competition Commission and Tribunal have both recognised that they are unlikely to oppose a large international merger that has already been approved in the US or the EU, given the relative size of the South African economy. The second phase of the 7-Up project will examine these issues in more detail.

Various types of sanctions and relief are provided for in the competition laws of the 7-Up nations. These include cease and desist orders, fines, imprisonment and compensation to injured parties. The fines are often very low; in Kenya the maximum fine is approximately US$1,300 and in Tanzania it is approximately US$3,750. Such fines will not deter large enterprises from anti-competitive practices. The South African and the new Indian legislation may be more effective since they relate the maximum fine to the size of the enterprise involved.

The powers of the competition authorities can be separated into 'investigative' and 'adjudicative' powers. Whether or not these powers are separated varies across the project countries, but all countries allow for appeal and final adjudication by and independent judiciary body.

The powers of the competition authorities can be separated into 'investigative' and 'adjudicative' powers. Whether or not these powers are separated varies across the project countries, but all countries allow for appeal and final adjudication by and independent judiciary body. The South African set-up with a 'self-contained' separate judicial system for competition cases is recommended by the World Bank-OECD Model law. However, such a set-up might not be constitutional in countries that provide for final Supreme Court jurisdiction in all cases, as is the case in India.

The lack of funds has generally resulted in competition authorities with inadequate facilities and resources to carry out their functions, and insufficiently attractive salaries to draw high-calibre staff.

After the introduction of the new law in Tanzania, the Kenyan authority will be the only one that is administratively part of a government department. However, this does not mean that the other authorities have sufficient autonomy from central government. In Pakistan for example, an attempt to curtail cartelisation and collusive pricing in the cement industry resulted in government intervention to fix prices at a 'mutually acceptable level'. Several factors influence the level of an authority's autonomy, including the method by which funds are allocated. In addition to funds from central government, Sri Lanka and South Africa receive some of their income from the filing fees that they receive. This increases their independence.

In most cases the authorities' budgets are extremely low. The lack of funds has generally resulted in competition authorities with inadequate facilities and resources to carry out their functions, and insufficiently attractive salaries to draw high-calibre staff. The largest portion of the budgets is usually spent on salaries, with very little on research and investigations, or meetings and conferences.

In most 7-Up countries there is also a shortcoming in the amount of on-the-job training for existing staff.

Many of the authorities are understaffed. There has been some difficulty in finding appropriate candidates to fill positions, and many research positions remain vacant. Though India has a large staff, this is dominated by support staff and there are few professionals. In most 7-Up countries there is also a shortcoming in the amount of on-the-job training for existing staff. In addition, authorities do not have access to adequate information on market structure; several of the countries have no industry database. In conjunction with the lack of experience and suitably qualified staff this will make complex tasks like assessing market dominance very difficult.

In many respects South Africa is better equipped than the other countries to carry out its functions. The office has a fully electronic information resource centre, and all reference material is available online. The Commission also uses a case management and tracking system, which allows users to keep track of the progress of cases. The Tribunal also has continuous training and development programmes and provides funding for staff to pursue higher study. However, even the South African authorities have difficulty in attracting high-calibre staff.

The introduction of a market economy has been relatively recent in the 7-Up economies, so there is a particular need to promote understanding in the general population on the benefits of competition and the costs of anti-competitive behaviour.

The introduction of a market economy has been relatively recent in the 7-Up economies, so there is a particular need to promote understanding in the general population on the benefits of competition and the costs of anti-competitive behaviour. Despite this need, the advocacy and outreach programmes of the competition authorities have been limited and most countries spend very little on publications and raising awareness.

On the whole, the 7-Up countries now have laws that are comprehensive enough to deal with the variety of practices and activities that infringe on the level of competition in their markets. Certain improvements would be necessary to complete this picture.

On the whole, the 7-Up countries now have laws that are comprehensive enough to deal with the variety of practices and activities that infringe on the level of competition in their markets. Certain improvements would be necessary to complete this picture. The main problems, however, are in the effective implementation of the laws. On the whole, the main barrier to this lies in the weakness in the capacities of the competition authorities, and their inexperience. Overcoming these difficulties will be much easier if governments and civil society are educated on competition issues.

7-UP COUNTRY PROFILES

	India	Kenya	Pakistan	South Africa	Sri Lanka	Tanzania	Zambia
Population[1] Millions (1999)	998	29	135	42	19	33	10
GDP Millions US$ (1999)	459,765	10,603	59,880	131,127	15,707	8,777	3,325
GNP/Capita US$PPP (1999)	2,149	975	1,757	8,318	3,056	478	686
Adult Illiteracy (1998):							
% Male (>15)	33	12	42	15	6	17	16
% Female (>15)	57	27	71	16	12	36	31
Poverty[2]							
% <National poverty line	40.9	42.0	34.0	-	40.6	51.1	68.0
% <$1/day	44.2	26.5	31.0	11.5	6.6	19.9	72.6
Exports % GDP							
1990	7	26	16	24	30	12	36
1999	11	25	15	25	36	20	29
Imports % GDP							
1990	10	32	23	19	37	35	58
1998	13	35	21	25	42	27	34
Currency	Indian Rupee	Kenyan Shilling	Pakistani Rupee	South African Rand	Sri Lankan Rupee	Tanzanian Shilling	Zambian Kwacha
Exchange Rate Currency / US$ (2000)	43.3[3]	76.2	51.7	6.9	75.1	800.4	3,110.80
Annual budget of CA US$ (2000)	406,582	235,892	325,919	7,742,678	97,870	162,056	193,005
Annual Govt Budget Millions US$ (2000)	68,840	3,230	13,560	23,270	3,395	1,010	340
% Government Budget	0.00059	0.00731	0.00240	0.03327	0.00288	0.01604	0.05619
Pattern of expenditure -% share (2000)							
Salaries & honoraria	66	54	33[4]	41	43	18	81
Establishment cost	31	36	16	21	53		0
Books, periodical etc	2.21	-	0.49		0.80		0
Research & investigation		-		7.1	0.39		11
Printing/publications		-			2.33		1.98
Meetings/conferences	0.66	0.33		3.6	0.18		5.87
Other		0.27					
Staff (2000/2001)							
Full time members	4	1	3	1	1	5	
Part time members	0	0	-	8	5	-	12
Professional	7	24	5		7	-	5
Support staff	85	6	25		7	-	6
Total	**96**	**31**	**33**	**78**	**20**	**5**	**23**

1 Data in the table comes from the World Development Report 2000, the World Bank, and the country reports.
2 Latest available year.
3 Budget and exchange rate figures for India are for 1999 (2000 not available).
4 Pattern of expenditure for Pakistan is for 1999.

ANNEXURE-1

Exchange Rates

	1980	1990	1999	2000
KSH/US$	7.4	22.9	70.3	76.2
Source: World Bank, (2001).				

ANNEXURE-2

Indicative Market Structure for Kenya, 1992 and 2000

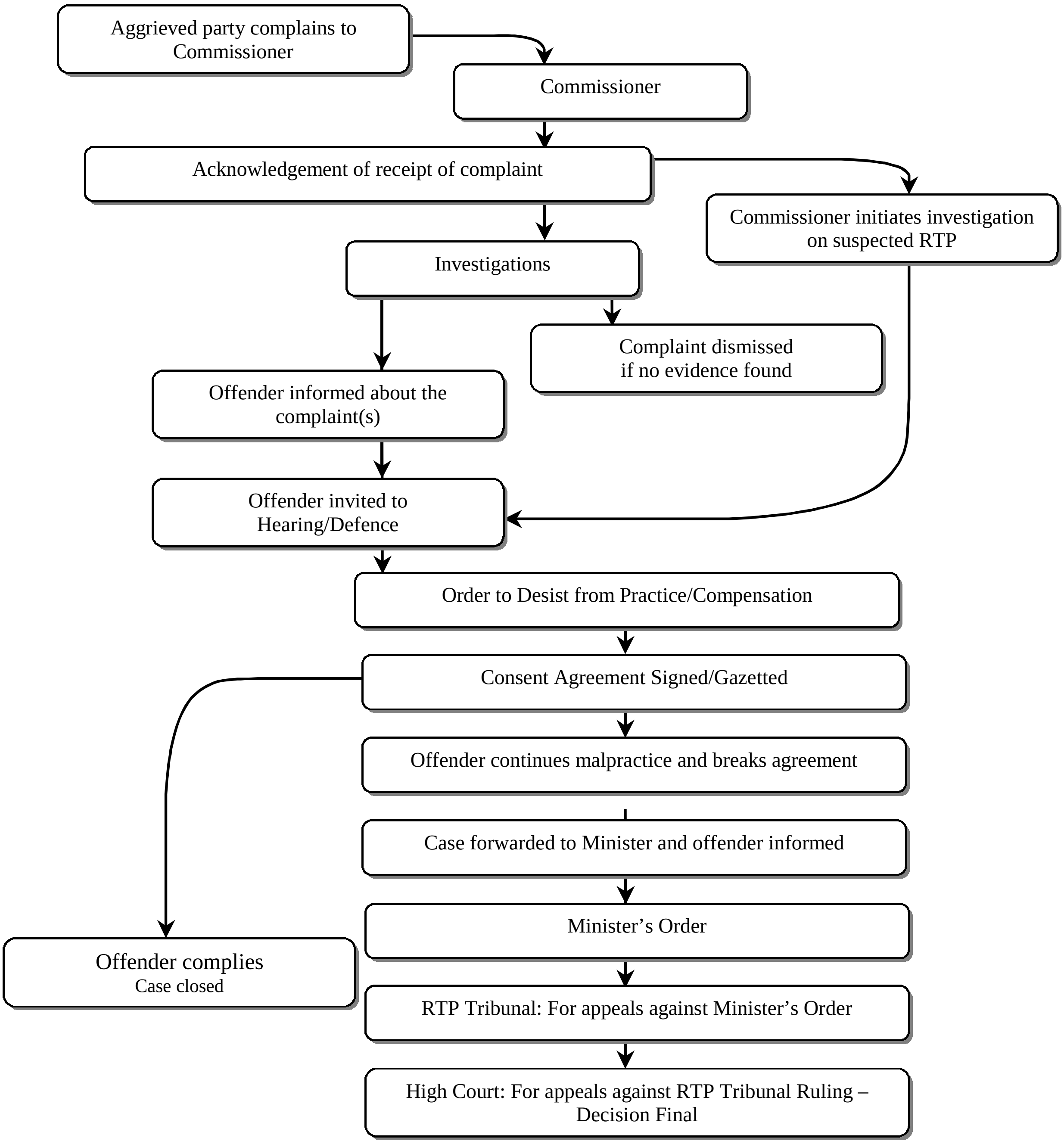
Item	SPECIFIC/GOOD/SERVICE	INDICATIVE NATURE OF MONOPOLY/COMPETITION	
		1992	**2000**
Petroleum	Imports/Wholesale supply Distribution	Public Monopoly No monopoly	8 firm oligopoly 8 firm oligopoly
Fertilizer	Imports Distribution	No monopoly No monopoly	Competitive Competitive
Exports of crops	Tea Coffee	No monopoly No monopoly	Competitive Competitive
Production Activities	Wheat Flour Milling Maize Milling Sugar Production Vegetable oil production Textile production Cement Production Mineral Extraction	No monopoly No monopoly Public monopoly No monopoly No monopoly Public monopoly No monopoly	Competitive Competitive Competitive Competitive Competitive 3 firm oligopoly Competitive
Import Trade	Wheat Rice Sugar Other Staple Foods Vegetable Oil Medicines Textiles Cement	Public monopoly No monopoly No monopoly No monopoly Private monopoly No monopoly No monopoly No monopoly	Competitive Competitive Competitive Competitive Competitive Competitive Competitive Competitive
Services	Banking Telecommunications Hiring of Labour Personal Insurance Import Insurance Urban Bus Transport	No monopoly Public monopoly No monopoly No monopoly No monopoly No monopoly	Oligopolistic Competition Duopoly Competitive Competitive Competitive Competitive

Source: Adapted from World Bank 1994, Table A.11.

ANNEXURE-3

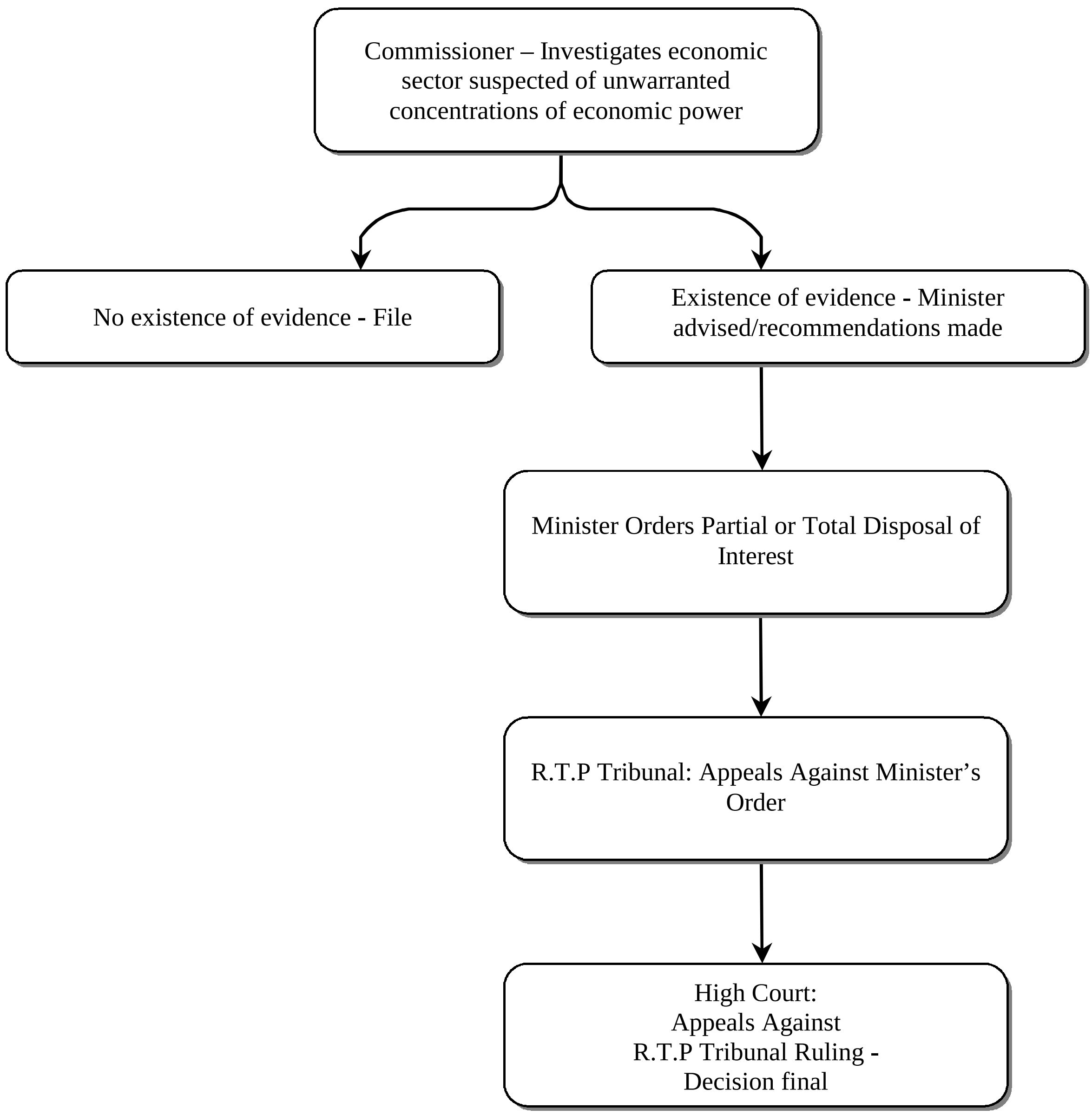
Charts of Treatment Procedures

Chart 1: Treatment Procedures for Restrictive Trade Practice (RTP) Complaints



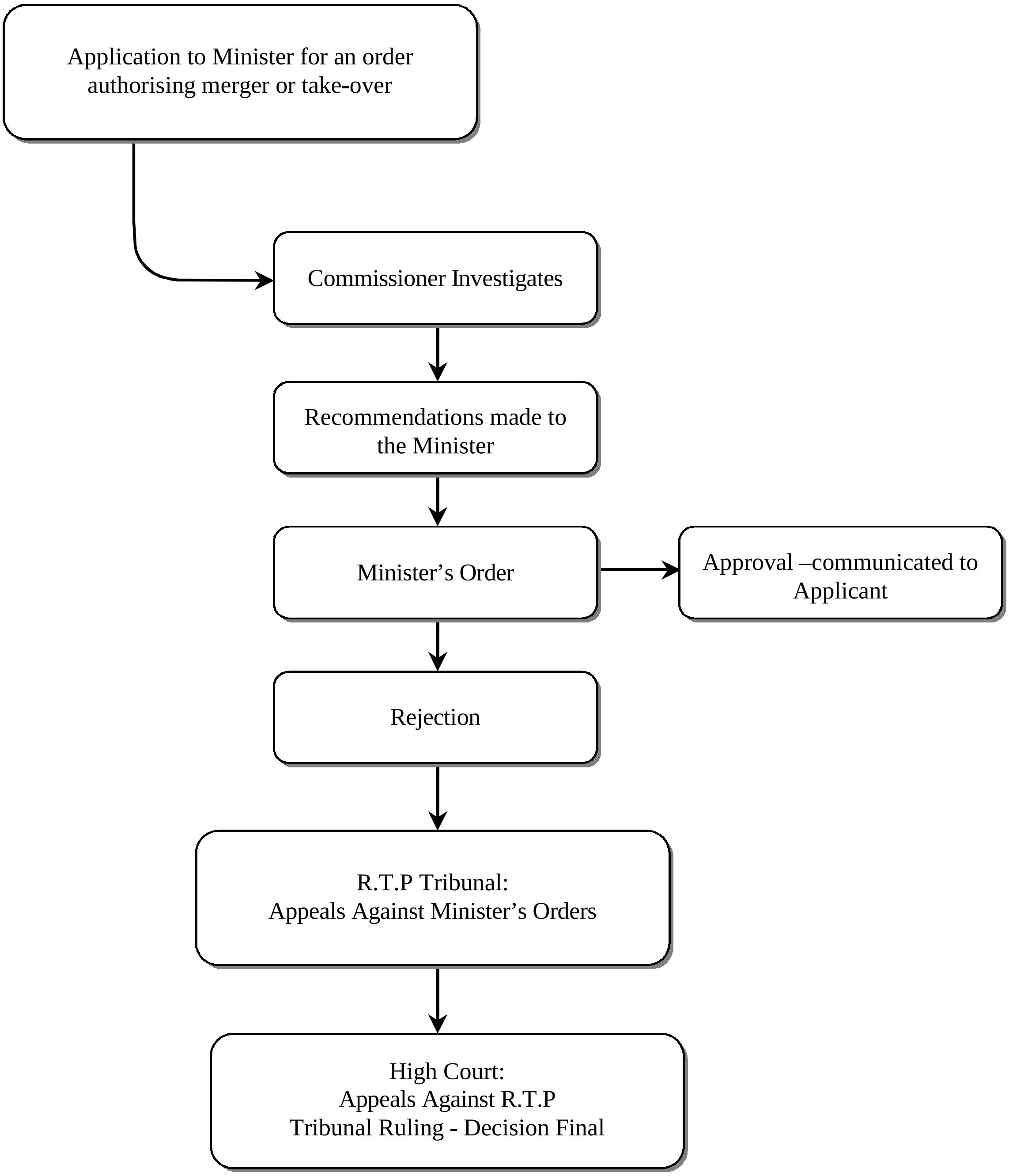
ANNEXURE-3 (Cont.)

Chart 2: Treatment Procedures for the Control of Unwarranted Concentrations of Economic Power



ANNEXURE-3 (Cont.)

Chart 3: Treatment Procedures for the Control of Mergers and Takeovers



ANNEXURE-4

ABOUT 7-Up

The 7-Up Project is a two- year research and advocacy programme being conducted by the Consumer Unity & Trust Society (CUTS) with the support of Department for International Development (DFID), UK for a comparative study of competition regimes in seven developing countries of the Commonwealth.

The countries selected for the Project are India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia, which have similar legal systems, and are at similar levels of economic development.

Main Objectives

The project primarily aims to:

- Evaluate the existing competition law and its implementation on a few basic principles: budgets, autonomy, composition and structure of the competition regime and authority;
- Identify typical problems and suggest solutions, including on the basis of good practices elsewhere;
- Suggest ways forward to strengthen existing legislation and institutions dealing with competition and consumer protection issues;
- Assess capacity building needs of the government, its agencies and the civil society;
- Develop strategies for building expertise among the competition agency officials, practitioners and civil society to deal with anti-competitive practices, including cross-border abuses more effectively; and
- Help build constituencies for promoting competition culture by actively involving civil society and other influential entities during this exercise.

Project Implementation

The project is being implemented by CUTS Centre for International Trade, Economics & Environment (CITEE) under the close supervision of an international advisory committee who are experienced in competition and related issues. The research and advocacy work of the project at country level is being done by local partners/ research institutions in the relevant countries. The following institutions have been involved in the project as partners:

- *India:* National Council of Applied Economic Research, New Delhi and CUTS, Jaipur
- *Kenya:* Institute of Economic Affairs, Nairobi
- *Pakistan:* Sustainable Development Policy Institute, Islamabad and The Network for Consumer Protection, Islamabad
- *South Africa:* Institute for Global Dialogue, Johannesburg
- *Sri Lanka:* Law & Society Trust, Colombo and Institute of Policy Studies, Colombo
- *Tanzania:* Economic and Social Research Foundation, Dar-es-Saalam and Christian Council of Tanzania, Dodoma
- *Zambia:* CUTS Africa Resource Centre, Lusaka and Zambia Consumers Association, Kitwe

The Project comprises of two phases, where Phase-I studied the institutional framework for enforcing the competition law in the project countries and Phase-II deals primarily with cross border competition issues.

The project, implemented under the close supervision of an international advisory committee, has two components: research and advocacy.

The research output of the project is designed to be based on:

- Study of relevant existing literature
- Field study, and
- Consultation with local stakeholders

The advocacy component of the project includes raising awareness among the various groups of stakeholders through meetings and publications and building constituencies that would help shaping a healthy competition culture. In this regard a National Reference Group, involving various stakeholders, has been formed in all the project countries.

It is expected that the project will be extended to implement some of the results of the project including providing capacity building and technical assistance to governments and civil society, as well as advocating for a healthy competition culture at different levels.

ENDNOTES

1 World Bank, (2001).

2 Republic of Kenya, (2000), p215.

3 Republic of Kenya, (2000), p3.

4 Republic of Kenya, (2000b), p4.

5 For the last published study, see House, W.J. (1976). For an analysis of monopoly power in Kenya's manufacturing sector based on the last published Census of Industrial Production, see Ong'olo, D. O, (1987).

6 The index calculates the sum of the squares of the market shares of the firms in a market. A Herfindahl-Hirschman Index value of 0 denotes perfect competition, and a value of 10,000 denotes pure monopoly. In a market where five companies each have a 20 percent market share, the Herfindahl-Hirschman Index would be ($20^2+20^2+20^2+20^2+20^2$) 4000. For comparison, the US merger guidelines consider a value above 1800 as highly concentrated, and below 1000 as weakly concentrated.

7 Pakes and McGuire, (1994).

8 See UNDP, (2001), table 15, p193.

9 As discussed in EAGER, (2000), p9.

10 Mosley, P, 1999.

11 Republic of Kenya, (2001a), p33.

12 World Bank (2000b), table 21.

13 Sponsored by the United Nations Conference on Trade and Development (UNCTAD), and held in Nairobi.

14 Republic of Kenya/Monopolies and Prices Commission (1997), p38.

15 Republic of Kenya/Monopolies and Prices Commission (1997), p39.

16 Some letters are in bold for emphasis. In retrospect, last year's demands by Kenya Airways for a rival but small airline on the domestic business route in Kenya to repay its debts which lead eventually to the declaration of bankruptcy for the rival airline would have been an interesting case for the MPC.

17 Vyas, (2001), p11.

18 Republic of Kenya/Monopolies and Prices Commission (1999), p16.

19 See for example US Department of Justice, (2000), p1, where it is reported that in Brazil, from June 1998 to September 1998, only 2 of the 48 notified transactions (4 percent) were not approved outright. In Canada during the fiscal year ending March 31, 1999, the Canadian Competition Bureau received notification of 192 transactions of which -all but 5 were approved outright. In the European Commission only 14 transactions out of 292 notifications (less than 5 percent) in 1999 were challenged or subjected to a second-phase investigation. In Taiwan, of the 1,045 notified cases that were concluded in 1999, all but 13 (less than 2 percent) were approved. In the United States, of the 4,679 transactions notified during the fiscal year ending September 30th 1999 only 76 transactions (1.6 percent) resulted in enforcement actions.

20 These claims for jurisdiction can be distinguished as nationality claims, objective territorial claims, the security claim, the passive nationality claim or the universality claim.

21 WTO, (1997), p44.

22 This section draws from Singh and Dhumale, (1999).

23 Vyas, (2001), p11.

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Since its formation, the IEA's proactive policy recommendations have informed public debate on alternative policy choices. Through its activities and publications the Institute has contributed to furthering debate on policy choices and opened up areas previously seen as the preserve of the government. From this is emerging a group of professionals discussing policy issues and demanding changes in the various sectors in which they work.

Due to its broad-based membership and the diversity of issues it tackles, IEA has steadily carved a niche for itself as a credible non-partisan policy forum for dialogue as well as a knowledge broker and source of objective and reliable information.

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